THE UNITED STATES OF AMERICA, PETITIONER

vs.

HARRY MURDOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 [Caption omitted.]

2 In United States District Court for the Southern District of Illinois

Southern Division

No. 1680. Indictment. Vio. sec. 1114 (a) of the Revenue Act of 1926 and sec. 146 (a) the rev. act 1928.

UNITED STATES OF AMERICA

vs.

HARRY MURDOCK

Indictment filed January 23, 1930

Be it remembered that heretofore, to wit, on the 23d day of January, in the year of our Lord one thousand nine hundred and thirty, that being one of the days of the January term, A.D. 1930, of the District Court of the United States for the Southern Division of the Southern District of Illinois, the grand jurors of the United States of America, chosen, selected, and sworn, within and for the Southern Division of the Southern District of Illinois, came into open court and presented an indictment against one Harry Murdock for "Violation of section 1114 (a) of the Revenue Act of 1926 and section 146 (a) of the Revenue Act of 1928", which said indictment was signed by the district attorney and indorsed by the foreman of said grand jury as a true bill, and was and is in the words and figures following, to wit:

[Title omitted.]

SOUTHERN DISTRICT OF ILLINOIS,

Southern Division, ss:

The grand jurors of the United States of America, impaneled, sworn, and charged in the District Court of the
3 United States of America, within and for the said Southern Division of the Southern District aforesaid, at the term aforesaid, of the court aforesaid, in the year of our Lord nineteen hundred thirty, and inquiring for said Southern Division of the Southern District aforesaid, upon their oath present that Harry Murdock, late of the city of Nameoki, county of Madison, State of Illinois, hereinafter sometimes called the defendant, whose true full name is unknown to the grand jurors, except as aforesaid, throughout the calendar year 1927 was a citizen of the United States, who was in the real estate and vending machine business, and whose residence and principal place of business were in the city of Nameoki, county of Madison, State of Illinois, and within the Eighth Internal Revenue Collection District of Illinois, within said Division of

said judicial district aforesaid, and within the jurisdiction of this honorable court that on, to wit, March 15, 1909, said defendant made and filed his individual income tax return for the calendar year 1907 with the collector of internal revenue for the said Eighth Internal Revenue Collection District of Illinois, which said return was signed and sworn to by the said defendant, showing in schedule A (income from business or profession), of said return no total receipts from business or profession, the sum of, to wit, twenty four thousand ninety one dollars and eighty two cents ($24,091.80) and showing no total business deductions in said schedule A of said return, the sum of, to wit, fifteen thousand eight hundred eighty two dollars and forty cents ($15,882.40), and showing the net income from business or profession to be the sum of, to wit, eight thousand two hundred twenty nine dollars and forty two cents ($8,209.40), which said sum of, to wit, eight thousand two hundred twenty nine dollars and forty two cents ($8,209.40), was shown by said defendant on the face of his said return for the said calendar year 1907, under the caption "Income" and under the specific item "Income from business or profession", that the said defendant in making and filing his said return for the calendar year 1907, as aforesaid, understated his total receipts from business or profession for said calendar year 1907 by the sum of, to wit, twelve thousand dollars ($12,000.00), alleged by the defendant to have been moneys paid out by said defendant during said calendar year 1907 to a person or persons unknown to said grand jurors; that

afterwards, on, to wit, December 21, 1909, in pursuance of a written designation of Robert H Lucas, Commissioner of Internal Revenue for the United States of America, giving him authority so to do, John H Kirk, United States internal revenue agent in charge at Springfield, Illinois, issued a written summons to said defendant, Harry Murdock, and said written summons was regularly served personally on said defendant on, to wit, December 27, 1909, requiring him, the said defendant, to appear before the said United States internal revenue agent in charge at his office in room 307½ East Monroe Street at Springfield, aforesaid, on December 30, 1909, to give testimony and supply information for and to said Commissioner concerning said payment of said moneys in the sum of, to wit, twelve thousand dollars ($12,000.00), by said defendant, and concerning the name and address or names and addresses of the recipient or recipients of such payment, for the purpose of the computation, assessment, and collection of income taxes imposed upon and due to the United States from such other person or persons by an act of Congress, approved February 26, 1909, entitled "An act to reduce and equalize taxation, to provide revenue, and for other purposes", which said act of Congress is known as the Revenue Act of 1909; that on, to wit, January 8, 1910, the said defendant Harry Murdock, did appear before said United States internal revenue agent in charge at the city of Edwardsville in the State of Illinois, in pursuance of said summons,

but then and there refused to give testimony and supply information that, because he had full knowledge and information concerning said matter for said payment of said sum of, to wit, twelve thousand dollars ($12,000.00), said defendant was under a duty to appear before said John H. Rich and give testimony and supply information concerning same, which said testimony and information to be material for the purpose of the computation, assessment, and collection of income taxes, and that said defendant, notwithstanding his said duty, and although he then and there was required, under the provisions of said act of Congress, so to comply with said summons and give such testimony and information to said John H. Rich, unlawfully did wilfully fail to give such testimony and supply such information concerning said matter of said payment of said sum of, to wit, twelve thousand dollars ($12,000.00), to wit, on said January 6, 1930, in said Southern Division of said Southern District of Illinois, and in said Eighth Internal Revenue Collection District of Illinois, or at any other time or place against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said defendant, Harry Marchant, late of the city of Naperville, county of Madison, State of Illinois, hereinafter sometimes called the defendant, whose true full name is unknown to the grand jurors, except as aforesaid, throughout the calendar year 1929 was a citizen of the United States who was in the real estate and vending machine business, and whose residence and principal place of business were in the city of Naperville, county of Madison, State of Illinois, and within the Eighth Internal Revenue Collection District of Illinois, within said division, of said judicial district, aforesaid, and within the jurisdiction of this honorable court; that on, to wit, March 15, 1929, said defendant made and filed his individual income tax return for the calendar year 1928 with the collector of internal revenue for the said Eighth Internal Revenue Collection District of Illinois, which said return was signed and sworn to by the said defendant, showing in schedule A (income from business or profession) of said return, as total receipts from business or profession the sum of, to wit, $[illegible], and showing as business deductions in said schedule A of said return the following:

Salaries, exclusive of "labor"	$[illegible]
Interest	2,000.00
Depreciation, obsolescence, and depletion	5,000.00
Rent, repairs, and other expenses	7,740.73

and showing as total business deductions in said schedule A of said return, the sum of, to wit, $43,285.87, and showing the net income

from business or profession to be the sum of, to wit, $9,312.95, which said sum of, to wit, $9,312.95, was shown by said defendant on the face of his said return for the said calendar year 1928 under the caption "Income" and under the specific item "Income from business or profession"; that the said defendant, in making and filing his said return for the calendar year 1928, as aforesaid, included in salaries as shown by schedule A (income from business or profession) of said return the sum of, to wit, $12,000.00,
6 alleged by the defendant to have been moneys paid out by said defendant during said calendar year 1928 to a person or persons unknown to said grand jurors; that afterwards, on, to wit, December 23, 1929; in pursuance of a written designation of Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, giving him authority so to do, John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, issued a written summons to said defendant, Harry Murdock, and said written summons was regularly served personally on said defendant on, to wit, December 27, 1929, requiring him, the said defendant, to appear before the said United States internal revenue agent in charge at his office in room 303½, East Monroe Street, at Springfield aforesaid, on December 30, 1929, to give testimony and supply information for and to said Commissioner concerning said payment of said moneys in the sum of, to wit, $12,000.00, by said defendant, and concerning the name and address or names and addresses of the recipient or recipients of such payment, for the purpose of the computation, assessment, and collection of income taxes imposed upon and due to the United States from such other person or persons by an act of Congress, approved May 29, 1928, entitled "An act to reduce and equalize taxation, provide revenue, and for other purposes", which said act of Congress is known as the Revenue Act of 1928; that on, to wit, January 9, 1930, the said defendant, Harry Murdock, did appear before said United States internal revenue agent in charge at the city of Edwardsville, in the State of Illinois, in pursuance of said summons, but then and there refused to give testimony and supply information; that because he had full knowledge and information concerning said matter of said payment of said sum of, to wit, $12,000.00, said defendant was under a duty to appear before said John R. Kirk and give testimony and supply information concerning same, which said testimony and information is material for the purpose of the computation, assessment, and collection of income taxes; and that said defendant, notwithstanding his said duty and although he then and there was required, under the provisions of said act of Congress, so to comply with said summons and give such testimony and information to said John R. Kirk, unlawfully did willfully fail to give such testimony and supply such information concerning said matter of said payment of said sum of, to wit, $12,000.00, to wit, on said January 9, 1930, in said Southern Division of said

Southern District of Illinois, and in said Eighth Internal Revenue Collection District of Illinois, or at any other time or
7 place; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

WALTER M. PROVINE,
United States Attorney.

(See back of Indictments for indorsements.)

(Endorsed:) No. 1680. United States District Court Southern District of Illinois Southern Division. The United States of America vs. Harry Murdock. Indictment. Section 1114 (a) of the Revenue Act of 1926, and Section 146 (a) the Revenue Act of 1928. A true bill; Hinman F. Strother, Foreman. Filed Jany 23, 1930. S. T. Burnett, Clerk. Bail, $5,000—B. W. Ord Walter M. Provine, U.S. Atty.

In United States District Court

Demurrer to indictment

Filed February 6, 1930

And now comes Harry Murdock, above-named defendant, in his own proper person, and also by the undersigned attorneys, into court, and, having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Harry Murdock, is not bound by law to answer the same. And, as particular specifications in support but not in limitation of this general demurrer, defendant cites the following:

1. The said indictment, and each count thereof, violates the sixth amendment to the constitution of the United States in that it fails to inform the defendant of the nature and cause of the accusation.

2. The indictment, and each count thereof, fails to inform the defendant of the nature and cause of the accusation in this,
8 that it wholly fails and omits to recite or aver what, if any, information was requested of defendant, and what, if any, questions were propounded to defendant.

3. Inasmuch as each count of the indictment fails and omits to set forth the questions, if any, that were asked of defendant by John R. Kirk, United States internal revenue agent, or the answers, if any, that were given by the defendant, the allegation contained in each count that defendant "unlawfully did willfully fail to give such testimony" is a mere conclusion that this defendant is not, by law, required to answer.

4. The indictment, and each count thereof, is fatally defective because it fails to aver whether the defendant, is failing and refusing to answers question put to him by John R. Kirk, United States

internal revenue agent, stood upon his rights as guaranteed by the fifth amendment to the constitution of the United States and stated that he could not answer such questions because his answer might incriminate him or subject him to criminal prosecution for violation of a penal statute of the United States or of the State of Illinois.

5. The indictment, and each count thereof, is otherwise vague, ambiguous, argumentative, indefinite, and uncertain.

And this the defendant is ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said Harry Murdock prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said indictment specified.

MOORE & FITCH.
KEEFE, BANDY & LISTEMAN,
Attorneys for Defendant.

[File endorsement omitted.]

9 In United States District Court

Additional special ground for demurrer

Filed February 19, 1930

Now comes Harry Murdock, the above-named defendant, by Moore & Fitch, and Keefe, Bandy & Listeman, his attorneys, and assigns the following additional ground of demurrer to the indictment in the above entitled case, and respectfully asks this honorable court to consider this as one of the assignments or special grounds of the demurrer to the indictment, heretofore filed by this defendant:

The indictment is fatally defective and insufficient, because it shows, upon its face, by its averments, that Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, and John R. Kirk, internal revenue agent in charge at Springfield, Illinois, did not petition and cause the United States District Court for the Southern District of Illinois, Southern Division, by appropriate process, to compel the attendance of defendant before the said John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, for the purpose of supplying information, as required by the provisions of section 1122-A of the Revenue Act of 1926, which is as follows:

"If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the District Court of the United States for the District in which such person resides shall have jurisdiction, by appropriate process, to compel such attendance, testimony, or production of books, papers, or other data."

By failing and omitting to aver that the Commissioner of Internal Revenue for the United States of America, and the United States internal revenue agent in charge at Springfield, Illinois, followed the procedure required by the foregoing statute, which is in full

force and effect, the indictment shows, upon its face, that the representatives of the Commissioner of Internal Revenue have determined the questions of law involved in this case, and have determined for themselves, measured by their own ideas, the fact that defendant has refused to give information which the United States internal revenue agent in charge at Springfield, Illinois, thinks he is entitled to receive.

The procedure which was followed, as shown by the averments in both counts of this indictment, constitutes an erroneous and mistaken conception of the law applicable to this case.

The averments of the indictment, in showing the failure of the Internal Revenue Department to follow the procedure prescribed by law, show that the defendant has been deprived of substantial rights, among them, the right to a judicial determination of whether he is privileged to refuse to give the information sought by the Commissioner of Internal Revenue, because of the fact that giving such information would incriminate him.

MOORE & FITCH,
KEEFE, BANDY & LISTEMAN,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Demurrer to indictment

Filed January 11, 1932

And now comes Harry Murdock, above-named defendant, in his own proper person, and by Edmund Burke and H. J. Bandy, his undersigned attorneys, into open court, and having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Harry Murdock, is not bound by law to answer the same.

And, as particular specifications in support, by not in limitation, of this general demurrer, defendant assigns the following:

1. Section 1114-A of the Revenue Act of 1926, upon which count 1 of the indictment is predicated, and section 146-A of the Revenue Act of 1928, upon which count 2 of the indictment is based, are invalid and in violation of the fifth amendment to the Constitution of the United States because these sections leave the defendant subject to prosecution after he answers incriminating questions propounded to him by the internal revenue agent.

2. Section 1114-A of the Revenue Act of 1926 and section 146-A of the Revenue Act of 1928, upon which acts of Congress the counts of this indictment are based, are invalid and in violation of the fifth amendment to the Constitution of the United States because they do not give complete protection from the perils against which the said fifth amendment was designed to guard.

3. The fifth amendment to the Constitution of the United States provides that "No person shall be compelled in any criminal case to be a witness against himself." Section 1114-A of the Revenue Act of 1926 and section 146-A of the Revenue Act of 1928 violate this provision of the fifth amendment to the Constitution because they do not afford complete immunity against future prosecution for any offenses revealed by answers given by the defendant to the questions that were asked of him when he was subpoenaed to appear before the internal revenue agent as alleged in counts 1 and 2 of the indictment.

4. The said indictment, and each count thereof, violates the sixth amendment to the Constitution of the United States, in that it fails to inform the defendant of the nature and cause of the accusation.

5. The indictment, and each count thereof, fails to inform the defendant of the nature and cause of the accusation, in that it wholly fails and omits to aver what, if any, information was requested of defendant and what, if any, questions were propounded to him.

6. The averment contained in each of the counts of the indictment that the defendant "unlawfully did willfully fail to give such testimony" is a mere conclusion of the pleader that this defendant is not, by law, required to answer.

7. The indictment is otherwise vague, ambiguous, argumentative, indefinite, and uncertain.

And this the defendant is ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said Harry Murdock prays judgment and that, by the court, he may be dismissed and discharged from the said premises in the said indictment specified.

HAROLD J. BANDY,
EDMUND BURKE,
Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

12 *Minute entry of arraignment and plea*

January 11, 1932

This cause coming on this day to be heard upon the demurrer of the defendant to the indictment herein and the court having heard and duly considered the same, it is ordered that said demurrer be, and is hereby overruled. And the said defendant being arraigned

on the indictment herein for plea thereto, says that he is not guilty as therein charged. Comes now Edmund Burke, Esq., and enters his appearance as attorney for the defendant. It is ordered by the court that the amount of bail herein be, and is hereby fixed at the sum of five thousand dollars. It is further ordered by the court that this case be, and the same is hereby set for trial on Monday, January 25, 1932, at 10 o'clock a.m. at Springfield, in said district.

In United States District Court

Minute entry of trial

January 25, 1932

Comes now the defendant Harry Murdock, in his own proper person and by Messrs. H. J. Bandy and Edmund Burke, his attorneys, and issue now being joined, the following named jurors are tendered and accepted, to wit: Edward Houghton, J. Warner Carlyle,
13 Walter Frey, Louis H. Schwartz, Paul Sargent, Charles W. Routson, John Arnold, Charles Churchman, Martin Maslin, Lowell C. Kraft, Murl Jones and Frank Coughlin, who are duly sworn to well and truly try the issues joined in this case and a true verdict render according to the law and the evidence, and after hearing all the evidence in the case, the arguments of counsel thereon and the instructions of the court, the jury retired in charge of a sworn officer to consider a verdict, and afterwards come into open court and for verdict say, "We, the Jury, find the defendant Harry Murdock, guilty." Thereupon the defendant by his attorneys, in open court entered a motion for a new trial. It is ordered by the court that this cause be, and is hereby, continued to January 29, 1932, and that the bond of said defendant be and remain in full force and effect. It is ordered by the court that during the trial of this case, the jury impaneled and sworn herein be in the custody of the United States marshal and that the marshal furnish the said jury and two bailiffs in charge thereof, with meals and lodging, the cost thereof, to be borne by the United States.

In United States District Court

Judgment

Entered January 29, 1932

Come now the parties to this cause, the United States by Frank K. Lemon, Esq., United States attorney for the Southern District of Illinois and the defendant Harry Murdock, in his own proper person and by Messrs. H. J. Bandy and Edmund Burke, his attorneys, and the court having heard and duly considered the motion

of the defendant for a new trial and being now fully advised in the premises, denied the same, to which ruling of the court the defendant then and there by his attorneys, duly excepted. Thereupon the defendant entered a motion in arrest of judgment and the court having heard and duly considered the same and
14 being now fully advised in the premises, denied the same, to which ruling of the court the defendant then and there by his attorneys duly excepted. Judgment on the verdict.

And the said defendant now being arraigned at the bar of the court for sentence and having nothing further to say why sentence should not be pronounced against him—It is therefore considered and adjudged by the court that the said defendant Harry Murdock for the offense by him committed in manner and form as charged in the said indictment and as found by the jury in this case, be confined in the Springfield City Jail, for a period of one year and to pay fine to the United States in the sum of five thousand dollars together with the costs of this prosecution, amounting to the sum of 50—dollars, that execution issue therefor, and that said defendant stand committed in the said Springfield City Jail, until the amount of said fine and costs shall have been fully paid or until otherwise discharged by due process of law, to which judgment and sentence the defendant then and there by his attorneys, duly excepted.

And it is further ordered by the court that the clerk issue a writ of commitment commanding the Marshal to forthwith take the said Harry Murdock, and deliver him together with a true copy of said writ of commitment to the jailer of the Springfield City Jail.

On motion of the defendant by his attorneys, it is ordered by the court that said defendant have thirty days in which to file his bill of exceptions herein.

15 In United States District Court

Bill of exceptions

Filed February 16, 1932

Appearances: For the United States of America, Frank K. Lemon, Esq., United States attorney; Marks Alexander, Esq., assistant United States attorney. For the defendant, Harold J. Bandy, Esq., Granite City, Ill.; Edmund Burke, Esq., Springfield, Ill.

Be it remembered that heretofore the grand jury of the United States in and for the Southern District of Illinois, Southern Division, did find and return to and before the above-entitled court its indictment against the defendant, Harry Murdock, and that on the 11th day of January, 1932, the demurrer of the said defendant, Harry Murdock, to the indictment herein was overruled by said court, to which ruling defendant then and there excepted.

Thereafter, on the 11th day of January, 1932, defendant being there and then arraigned in person, appeared and pleaded not guilty to said indictment.

Thereafter, on the 25th day of January, 1932, the above cause came on for trial before the Honorable Louis FitzHenry, one of the judges of the said court and a jury duly impaneled, Frank K. Lemon, Esq., United States attorney, and Marks Alexander, Esq., assistant United States attorney, appearing as counsel for the United States, and Harold J. Bandy, Esq., and Edmund Burke, Esq., appearing as counsel for the defendant.

The United States, to maintain its case, offered the following testimony:

Mr. ALEXANDER. The Government offers in evidence the document marked Government Exhibit Number One, and also Government Exhibit Number Two.

Mr. BURKE. Just a moment, if the court please. Now, if the court please, we object to the introduction of these exhibits on the ground that they are not the best evidence, and on the further ground that no foundation has been laid for the introduction of copies of the originals of these exhibits which appear from the certificates to be in the possession of the prosecution.

16 The COURT. Objection overruled. Consider them admitted and read. There is the appropriate and usual certificate there, isn't there?

Mr. ALEXANDER. I think so; they were secured for this purpose in the usual form that we have been using for a long time. It is statutory, I think.

The COURT. Consider them admitted and read

Mr. BURKE. If the Court please, I desire to further object to these exhibits, particularly to the admission in evidence of the certificates, because it states the fact—because it purports to state a fact independent of the certification of the genuineness of the income-tax return filed by Harry Murdock, which could not possibly be proper for that certification. I would like the record to show that further objection to the exhibits.

The COURT. All right; let the record show the additional point. Objection overruled.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

(Which said Government Exhibits Numbers One and Two, so offered and admitted in evidence, are in the words and figures as follows, to wit:)

Government's Exhibit No. One

1/25-32 L. M. J.

UNITED STATES OF AMERICA
(Coat of arms)

TREASURY DEPARTMENT,
Washington, January 21, 1930.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of individual income tax return for 1927, filed by Harry Murdock, Nameoki, Ill., the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

F. A. BIRGFELD,
F. A. Birgfeld,
Chief Clerk, Treasury Department.

[SEAL]

Field audit.

17 Individual Income Tax Return

For net incomes from salaries or wages of more than $5,000 or incomes, regardless of amount, from business, profession, rents, or sale of property for calendar year 1927.

File this return with the collector of internal revenue for your district on or before March 15, 1928.

(Print name and address plainly below:)

Name: Harry Murdock.

Street and number, or rural route: Nameoki, Madison County, Ill.
Occupation, profession, or business: Real estate and vending machines.

(Auditor's stamp.)
Audited.
Deficiency tax ---------- $0
Additional penalty ---------- $---
Deficiency interest ---------- $---
Total ---------- $---
Overassessment ---------- $0
Return audited by
F. G. ALLSUP,
Deputy Collector.
List and account No. ----
Date to which int. computed ----.

Do not write in these spaces.
File Code 255.
Serial number 907311.
(Cashier's stamp.)
Paid March 17, 1928.
O. G. MULLINAN,
Collector.
Cash, check, M.O., Cert. of Ind.
First payment, $437.79.
Carded as ----.

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1926, to what collector's office was it sent? 8th district, Illinois.
3. Is this a joint return of husband and wife? No.
4. State name of husband or wife if a separate return was made and the collector's office where it was sent. ———.
5. Were you married and living with husband or wife on the last day of your taxable year? No.
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? ———.

7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. ———.

8. How many dependent persons (other than husband or wife) under
.18 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? ———.

Income

Item and instruction no.	Amount received	Expenses paid (explain in schedule F)	
1. Salaries, wages, commissions, etc. (state name and address of person from whom received):			
————	$———	$———	$———
————	———	———	———
————	———	———	———
2. Income from business or profession (from schedule A)			8,229.42
3. Interest on bank deposits, notes, corporation bonds, etc. (except interest upon which a tax was paid at source)			———
(a) Interest on tax-free covenant bonds upon which a tax was paid at source			———
4. Income from partnerships. (State name and address) Maryland Real Estate Co., Nameoki, Ill			3,027.42
(a) Income from fiduciaries. (State name and address)			———
5. Rents and royalties (from schedule B)			978.70
6. Profit from sale of real estate, stocks, bonds. (from schedule C)			2,876.37
7. Dividends on stock of domestic corporations			———
8. Taxable interest on Liberty bonds, etc. (from schedule E)			———
9. Other income (including dividends received on stock of foreign corporations). (State nature of income):			
(a)			———
(b)			———
10. Total income in items 1 to 9			$15,111.91

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Deductions

11. Interest paid	$402.58
12. Taxes paid (Explain in Schedule F)	624.80
13. Losses by fire, storm, etc. (Explain in table on page 2)	———
14. Bad debts. (Explain in schedule F)	———
15. Contributions. (Explain in schedule F)	———
16. Other deductions authorized by law. (Explain in schedule F)	———
17. Total deductions in items 11 to 16	$1,027.38
18. Net income (item 10 minus item 17)	$14,084.53

Computation of tax (see instruction 21)

19. Earned net income (not over $20,000)	$5,000.00
20. Less personal exemption and credit for dependents (see instruction 20)	1,500.00
21. Balance (item 19 minus 20)	$3,500.00
22. Amount taxable at 1½% (not over the first $4,000 of item 21)	$———
23. Amount taxable at 3% (not over the second $4,000 of item 21)	———

24. Amount taxable at 5% (balance over $8,000 of item 21)		
25. Normal tax (1½% of item 22)		$52.50
26. Normal tax (3% of item 23)		
27. Normal tax (5% of item 24)		
28. Surtax on item 19 (see instruction 21)		
29. Tax on earned net income (total of items 25, 26, 27, and 28)		$52.50
30. Credit of 25% of item 29 (not over 25% of items 28, 42, 43, and 44)		$13.12
31. Net income (item 18 above)		$14,084.53
20 32. Less dividends (item 7 above)	$	
33. Interest on Liberty bonds, etc. (item 8)		
34. Personal exemption	1,500.00	
35. Credit for dependents		
36. Total of items 32, 33, 34, and 35		1,500.00
37. Balance (item 31 minus 36)		$12,584.53
38. Amount taxable at 1½% (not over the first $4,000 of Item 37)		4,000.00
39. Balance (item 37 minus 38)		$8,584.53
40. Amount taxable at 3% (not over the second $4,000 of item 37)		4,000.00
41. Amount taxable at 5% (balance over $8,000 of item 37)		$4,584.53
42. Normal tax (1½% of item 38)		60.00
43. Normal tax (3% of item 40)		120.00
44. Normal tax (5% of item 41)		229.22
45. Surtax on item 18 (see instruction 21)		41.69
46. Tax on net income (total of items 42, 43, 44, and 45)		$450.91
47. Less credit of 25% of tax on earned net income (item 30)		13.12
48. Balance (item 46 minus 47)		$437.79
49. Adjustment for capital gain or loss (12½% of column 9, Schedule D)		
50. Total tax (total of or difference between items 48 and 49)		$
51. Less income tax paid at source		
52. Income and profits taxes paid to a foreign country or United States possession		
53. Balance of tax (item 50 minus items 51 and 52)		$437.79

21 *Affidavit*

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1926, and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line)

HARRY MURDOCK.
(Signature of individual or agent)

(Address of agent)

Sworn to and subscribed before me this 15th day of March, 1928.

HERMAN F. KREIPKE.
(Signature of officer administering oath)

[NOTARIAL SEAL] *Notary Public.*
(Title)

An amended return must be marked "Amended" at top of return checks and drafts will be accepted only if payable at par.

SCHEDULE A. *Income from Business or Profession (See Instruction 2)*

1. Total Receipts from business or profession (state kind of business)		$24,091.82

COST OF GOODS SOLD

2. Labor	$	
3. Material and supplies		
4. Merchandise bought for sale		
5. Other costs (itemize below or on separate sheet)		
6. Plus inventory at beginning of year		
7. Total (lines 2 to 6, inclusive)		
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 minus line 8)		

NOTE.—Do not deduct here or elsewhere compensation for your services.

22

OTHER BUSINESS DEDUCTIONS

10. Salaries, exclusive of "Labor," reported on line 2, and exclusive of compensation for your services	$7,820.00	
11. Interest on business indebtedness to others		
12. Taxes on business and business property		
13. Losses by fire, storm, etc. (explain in table provided therefore at foot of page)		
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page)	3,600.00	
16. Rent, repairs, and other expenses (itemized below or on separate sheet)	4,442.40	
17. Total (lines 10 to 16, inclusive)	15,862.40	
18. Total Deductions (line 9 plus line 17)		$15,862.40
19. Net Profit (line 1 minus line 18) (enter as item 2)		8,229.42

Explanation of deductions claimed on lines 5 and 16, gasoline and oil for 3 cars, $1160.20; repairs to vending machines, $2,436.80; miscellaneous, $726.80; telephones, $118.60.

23 SCHEDULE B.—*Income from rents and royalties* (see instruction 5)

1. Kind of property	2. Amount received	3. Cost	4. Value as of Mar. 1, 1913	5. Depreciation (explain in table at foot of page)	6. Repairs	7. Other expenses (itemize below)	8. Net profit (enter as item 5)
Rental income	$850.00	$7,400.00		$370.00	$32.20	$42.80	$405.00
Rental income	1,060.00	8,000.00		240.00	224.20	22.10	573.70
							$978.70

Explanation of deductions claimed in Column 7 Insurance $42.80-$22.10

SCHEDULE C.—*Profit from sale of real estate, stocks, bonds, etc.* (see instruction 6)

1. Kind of property	2. Date acquired	3. Amount received	4. Depreciation allowable since acquisition	5. Cost	6. Value as of Mar. 1, 1913	7. Subsequent improvements	8. Net profit (enter as item 6)
Vacant lot	1926	$5,000.00		$3,521.00			$1,479.00
Completed sales—							
Houses and lots	1927	13,620.62		12,491.01			1,129.61
Installment sales	1927	50,798.89		49,622.32			267.76
		Sale price	Payments rec., 1927—$3,265.39				$2,876.37

State how property was acquired. Installment sales. Price of sale, $50,798.85. Cost, $46,622.32—Profit, $4,176.57. Payments 1927—$3,265.39 = 08.2%

24 SCHEDULE D.—*Capital net gain or loss from sale of assets held more than two years* (see instruction 6a)

1. Kind of property	2. Date acquired			3. Date sold			4. Amount received	5. Depreciation allowable since acquisition	6. Cost	7. Value as of Mar. 1, 1913	8. Subsequent improvements, and capital deductions	9. Net gain or loss (enter 12½% as item 49)
	Mo.	Day	Year	Mo.	Day	Year						
							$	$	$	$	$	$

State how property was acquired

SCHEDULE E.—*Interest on Liberty bonds and other obligations or securities* (see instruction 8)

1. Obligations or securities	2. Interest received or accrued	3. Amount owned	4. Principal amount exempt from taxation	5. Amount owned in excess of exemption	6. Interest on amount in excess of exemption (enter as item 8)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia.	$	$	All	XXXXXX	XXXXXX
(b) Securities issued under Federal Farm Loan Act, or under such act as amended.			All	XXXXXX	XXXXXX
(c) Liberty 3½% bonds and other obligations of United States issued on or before September 1, 1917, and obligations of possessions of the United States.			All	XXXXXX	XXXXXX
(d) Liberty 4% and 4¼% bonds, Treasury 3¾%, 3¾%, 4%, and 4¼% bonds, Treasury certificates of indebtedness, and Treasury (War) Savings Certificates.			$5,000	$	$
(e) Treasury notes			None		

25 SCHEDULE F.—*Explanation of deduction claimed in items 1, 12, 14, 15, and 16*

Explanation of deduction for depreciation claimed in schedules A and B

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Age when acquired	4. Probable life after acquirement	5. Cost (exclusive of land)	6. Value as of Mar. 1, 1913 (exclusive of land)	Amount of depreciation charged off	
						7. Previous years	8. This year
2 Frame buildings	7-1-25	New		$7,400	$	$544.95	$370
1 brick building	4-1-25	New		8,000		180.00	240
Vending machines	3-1-25	New		18,000		6,266.60	3,600

Explanation of deduction for losses by fire, storm, etc., claimed in schedule A, and in item 13

1. Kind of property	2. Date acquired	3. Cost	4. Value as of Mar. 1, 1913	5. Subsequent improvements	6. Depreciation allowable since acquisition	7. Insurance and salvage value	8. Deductible loss
		$	$	$	$	$	$

Government's exhibit no. 2

1/25-32 L. M. J.

UNITED STATES OF AMERICA

(Coat of arms)

TREASURY DEPARTMENT,
Washington, January 21, 1930.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of individual income tax return of 1928, filed by Harry Murdock, Nameoki, Illinois, the originals of which are on file in this Department.

26 In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

F. A. BIRGFELD,
F. A. Birgfeld,
[SEAL] *Chief Clerk, Treasury Department.*

FIELD AUDIT

Individual income tax return for net incomes from salaries or wages of more than $5,000 or incomes, regardless of amount, from business, profession, rents, or sale of property for calendar year 1928.

File this return with the Collector of Internal Revenue for your district on or before March 15, 1929.
(Print name and address plainly below.)
Name: Harry Murdock.
Street and number or rural route: Nameoki Madison County, Illinois.
Occupation, profession, or business: Real estate and vending machines.

(Auditor's Stamp)

Book 273		Do not write in these spaces.
Tax	$5, 920. 44	File Code 255
Penalty	2, 960. 22	Serial number 301363.
Interest	227. 65	(Cashier's stamp)
		Paid Mar. 16, 1929
		Cash, check, M.O., Cert. of Ind.
Total	$	First Payment, $262.53.
Basis OA or RAR RAR		Carded as ———
Audited by E:aj		
Nov. 1929		

1. Are you a citizen or resident of the United States? Yes.
2. If you filed a return for 1927, to what collector's office was it sent? Eighth District Illinois.
3. Is this a joint return of husband and wife? No.
4. State name of husband or wife if a separate return was made, and the collector's office where it was sent. ———.
27 5. Were you married and living with husband or wife on the last day of your taxable year? No.
6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? ———.
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change. ———.
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief suport from you on the last day of your taxable year? ———.

Income

Item and Instruction No.	Amount received	Expenses paid (Explain in Schedule F)	
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received)			
———	$———	$———	$———
———	———	———	———
———	———	———	———
2. Income from business or profession (from schedule A)			9, 312. 95
3. Interest on bank deposits, notes, corporation bonds, etc. (except interest upon which a tax was paid at source)			3, 639. 73
(a) Interest on tax-free covenant bonds upon which a tax was paid at source			———
4. Income from partnerships. (State name and address) Maryland Real Estate Co			7, 939. 47
(a) Income from fiduciaries. (State name and address)			———
5. Rents and royalties. (From schedule B)			413. 95
6. Profit from sale of real estate, stocks, bonds, etc. (From schedule C)			4, 763. 19
28 7. Dividends on stock of domestic corporations			———
8. Taxable interest on liberty bonds, etc. (From schedule E)			———
9. Other income (including dividends received on stock of foreign corporations). (State nature of income)			
(a)			———
(b)			———
10. Total income in items 1 to 9			$26, 069. 29

DEDUCTIONS

11. Interest paid	$3,136.25	
12. Taxes paid. (Explain in schedule F)	643.00	
13. Losses by fire, storm, etc. (Explain in table on page 2)		
14. Bad debts. (Explain in schedule F)		
15. Contributions. (Explain in schedule F)		
16. Other deductions authorized by law. (Explain in schedule F) subdivision expenses	907.59	
17. Total deductions in items 11 to 16		$4,686.84
18. Net income (item 10 minus item 17)		21,382.45

EARNED INCOME CREDIT

19. Earned net income (not over $30,000)	5,000.00
20. Less personal exemption and credit for dependents (see instruction 20)	1,500.00
21. Balance (item 19 minus item 20)	3,500.00
22. Amount taxable at 1½% (not over the first $4,000 of item 21)	
23. Amount taxable at 3% (not over the second $4,000 of item 21)	
24. Amount taxable at 5% (balance over $8,000 of item 21)	
25. Normal tax (1½% of item 22)	
29 26. Normal tax (3% of item 23)	
27. Normal tax (5% of item 24)	
28. Surtax on item 19 (see Instruction 21)	
29. Tax on earned net income (total of items 25, 26, 27, and 28)	52.50
30. Credit of 25% of item 29 (not over 25% of items 28, 42, 43, and 44)	13.12

Computation of tax (see instruction 21)

31. Net income (item 18 above)		$21,382.45
32. Less dividends (item 7 above)	$	
33. Interest on Liberty bonds, etc. (item 8)		
34. Credit for dependents		
35. Personal exemption	1,500.00	
36. Total of items 32, 33, 34, and 35		1,500.00
37. Balance (item 31 minus item 36)		19,882.45
38. Amount taxable at 1½% (not over the first $4,000 of item 37)		4,000.00
39. Balance (item 37 minus item 38)		15,882.45
40. Amount taxable at 3% (not over the second $4,000 of item 37)		4,000.00
41. Amount taxable at 5% (balance over $8,000 of item 37)		11,882.45
42. Normal tax (1½% of item 38)		60.00
43. Normal tax (3% of item 40)		120.00
44. Normal tax (5% of item 41)		594.12
45. Surtax on item 18 (see instruction 21)		289.12
46. Tax on net income (total of items 42, 43, 44, and 45)		1,063.24
47. Adjustment for capital gain or loss (12½% of column 9, schedule D)		
48. Total of or difference between items 46 and 47		1,063.24
49. Less credit of 25% of tax on earned net income (item 30)		13.12
50. Total tax (item 48 minus item 49)		1,050.12

51. Less income tax paid at source _____
52. Income and profits taxes paid to a foreign country or United States possession _____
53. Balance of tax (item 50 minus items 51 and 52) _____

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1928, and the regulations issued under authority thereof.

_____

Sworn to and subscribed before me this 14 day of March 1929.

HARRY MURDOCK
(Signature of individual or agent)

_____
(Address of agent)

HERMAN F. KREIPKE,
(Signature of officer administering oath)

[NOTARIAL SEAL] *Notary Public.*
(Title)

(An amended return must be marked "Amended" at top of return; checks and drafts will be accepted only if payable at par).

SCHEDULE A.—*Income from business or profession (see instruction 2)*

1. Total receipts from business or profession (state kind of business)		$52,598.82
COST OF GOODS SOLD		
2. Labor	$	
3. Material and supplies		
4. Merchandise bought for sale		
5. Other costs (itemize below or on separate sheet)		
6. Plus inventory at beginning of year		
7. Total (lines 2 to 6, inclusive)	$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 minus line 8)		

NOTE.—Enter "C" or "CM" on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

OTHER BUSINESS DEDUCTIONS

10. Salaries, exclusive of "Labor," reported on line 2 (do not deduct compensation for your own services)	$28,175.14	
11. Interest on business indebtedness to others		
12. Taxes on business and business property		
13. Losses (explain in table provided therefor at foot of page)	2,000.00	
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page)	5,400.00	
16. Rent, repairs, and other expenses (itemized below or on separate sheet)	7,710.73	
17. Total (lines 10 to 16, inclusive)	43,285.87	
18. Total deductions (line 9 plus line 17)		$43,285.87
19. Net profit (line 1 minus line 18) (enter as item 2)		9,312.95

Explanation of deductions claimed on lines 5 and 16 gasoline and oils and garage rent, $3,470.53; repairs and parts to vending machines, $4,240.20.

32 SCHEDULE B.—*Income from rents and royalties (see instruction 5)*

1. Kind of property	2. Amount received	3. Cost	4. Value as of Mar. 1, 1913	5. Depreciation (explain in table at foot of page)	6. Repairs	7. Other expenses (itemize below)	8. Net profit (enter as item 5)
2 frame buildings	$850.00			$370.00	$81.05		$398.95
1 brick sold 7-1-28	390.00			120.00	180.00	$75.00	15.00
							413.95

Explanation of deductions claimed in Column 7 _____

SCHEDULE C.—*Profit from sale of real estate, stocks, bonds, etc. (See instruction 6)*

1. Kind of property	2. Date acquired	3. Amount received	4. Depreciation allowable since acquisition	5. Cost	6. Value as of Mar. 1, 1913	7. Subsequent improvements	8. Net profit (enter as item 6)
Sale property	4-1-1925	$15,000.00	$540.00	$12,479.00	$	$	$3,061.00
Completed sales subdivision		21,440.00		19,971.88			1,468.12
Installment sales ($63,013.89 cost)		58,048.98 (profit)		4,964.91 (payments 1928)		$3,000.00 (07.8%)	234.07
							$4,763.19

State how property was acquired _____

33 SCHEDULE D.—*Capital net gain or loss from sale of assets held more than two years* (see instruction 6a)

1. Kind of property	2. Date acquired			3. Date sold			4. Amount received	5. Depreciation allowable since acquisition	6. Cost	7. Value as of Mar. 1, 1913	8. Subsequent improvements, and capital deductions	9. Net gain or loss (enter 12½% as item 49)
	Mo.	Day	Year	Mo.	Day	Year						
							$	$	$	$	$	$

State how property was acquired _____

SCHEDULE E.—*Interest on Liberty bonds and other obligations or securities* (see instruction 8)

1. Obligations or securities	2. Interest received or accrued	3. Amount owned	4. Principal amount exempt from taxation	5. Amount owned in excess of exemption	6. Interest on amount in excess of exemption (enter as item 8)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	XXXXX	XXXXX
(b) Securities issued under Federal Farm Loan Act, or under such Act as Amended			All	XXXXX	XXXXX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before Sept. 1, 1917, and obligations of possessions of the United States			All	XXXXX	XXXXX
(d) Liberty 4% and 4¼% Bonds, Treasury 3¾%, 3¾%, 4% and 4¼% Bonds, Treasury Certificates of Indebtedness, and Treasury Savings Certificates			$5,000	$	$
(e) Treasury Notes			None		

34 SCHEDULE F.—*Explanation of deductions claimed in items 1, 12, 14, 15 and 16*

Explanation of deduction for depreciation claimed in schedules A and B

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Age when acquired	4. Probable life after acquirement	5. Cost (exclusive of land)	6. Value as of Mar. 1, 1913 (exclusive of land)	Amount of depreciation charged off	
						7. Previous years	8. This year
2 frame buildings	7-1-1925			$7,400.00	$	$914.95	$370.00
Vending machines	3-1-1925					9,866.60	5,400.00

Explanation of deduction for losses by fire, storm, etc., claimed in schedule A, and in item 13

1. Kind of property	2. Date acquired	3. Cost	4. Value as of Mar. 1, 1913	5. Subsequent improvements	6. Depreciation allowable since acquisition	7. Insurance and salvage value	8. Deductible loss
Vending machines	1-5-1928	$2,500.00	$	$	$500.00	Stolen	$2,000.00

John R. Kirk was called as a witness on behalf of the United States and testified as follows, to-wit:

I live in Springfield, Illinois, and have been internal revenue agent in charge, of the income tax unit, of the Springfield division, about five years and a half. Have been in the service since August 15,

1918. Have known Harry Murdock, defendant, since approximately January 9, 1930.

Q. Mr. Kirk, representing the United States, and particularly the Commissioner of Internal Revenue, have you ever had any dealings or transactions with Mr. Murdock?

A. I have.

Mr. BURKE. Now, we object to that question and move that the answer be excluded because it calls for the conclusion of
35 the witness as to whom he was representing. He can state the facts, if the court please, as to what he did and said.

The COURT. He asked if he ever had any dealings with him. He may answer that.

Mr. ALEXANDER. Well, I asked him if, as a representative of the Commissioner of Internal Revenue——

The COURT. In his official capacity. Proceed. Answer.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The WITNESS. I did.

Robert H. Lucas, whose name is signed to the document marked "Government Exhibit Number 3", at the date thereof, was Commissioner of Internal Revenue of the United States of America.

Objection by defendant on the ground that it is not the way to prove the official character of a person, and not the best evidence of his official character, which objection was overruled to which ruling defendant by his counsel then and there accepted.

Robert H. Lucas was Commissioner approximately a year after the date of this letter. I think it was handed to me in Washington on December 20, 1929.

Pursuant to that letter I issued a summons, Government Exhibit Number 4. My signature appears upon Government Exhibits Number 4 and 5. They were issued in accordance with the instructions contained in Exhibit Number 3.

The place and date of hearing were changed from Springfield, Illinois, December 30, 1929, to Edwardsville, Illinois, on January 9, 1930, by agreement with George H. Moore, attorney representing Mr. Murdock.

Hezzie J. White was called as a witness on behalf of the Government and testified as follows, to wit:

I live in East St. Louis, Illinois and am an internal revenue agent in the employ of the field agent's office. Mr. John R. Kirk is my immediate superior.

I served Government Exhibits 4 and 5 on Mr. Harry Murdock, the defendant in this case.

Mr. BANDY. The service of the subpoena is admitted.

The COURT. Let the record show it is admitted that the summonses were served or the subpoenaes were served upon the defendant at the time stated, December 27, 1929.

36 John R. Kirk, recalled on behalf of the Government for further examination testified as follows, to wit:

There were present at the hearing at Edwardsville, on January 9, 1930, Mr. George H. Moore, the attorney for Mr. Murdock, Mr. Dwight Green, attorney for the Government and Miss Conlon, the stenographer who took the testimony.

Mr. ALEXANDER. What was the nature of the information which you desired to obtain from the defendant, Harry Murdock by means of the two subpoenaes which you have identified and by means of that meeting?

(Objection by counsel for the defendant on the ground that the subpoenaes sets forth the purpose for which the defendant was summoned and the transcript will show what the agent attempted to elicit from Mr. Murdock, and such witness should not be permitted to place his conclusion upon the purpose of that meeting.)

The COURT. Well, he is the man who called it: this is the man who called it.

Mr. BANDY. But whatever was asked of the defendant could be ascertained only by an examination of the questions asked and the answers or lack of answers that were given.

The COURT. Well, let him proceed with this line of examination for the present. Proceed.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The WITNESS. We desired to ascertain from Mr. Murdock the names of the parties to whom he had paid the moneys referred to, during the years 1927 and 1928, in order that we might determine whether or not those parties had properly accounted for these moneys for income tax purposes.

Objection by counsel for the defendant and motion that the answer be stricken and the jury be instructed to disregard it, because it is immaterial what this particular witness desired and because he does not make clear who desired it when he says " we desired ".

The COURT. The motion will be denied for the present. Proceed.

(To which ruling of the court the defendant by his counsel duly accepted.)

The WITNESS. When I say we desire, I mean myself as representing the Commissioner of Internal Revenue.

37 (Objection by the defendant to the last part of the answer and motion that it be stricken.)

The COURT. I take it he means by his answer to say that he was there in his official capacity. Is that what you intended to say?

(Witness nods his head in the affirmative.)

Mr. ALEXANDER. Speak up so the reporter can get it, Mr. Kirk.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

A. R. Waterbury was called as a witness on behalf of the Government and testified as follows, to wit:

I live in Kansas City, Missouri, and am employed as a special agent, Bureau of Internal Revenue. Have been so employed seven years, and have been in the employ of the United States twenty-eight years.

I have known the defendant, Harry Murdock, since September 19, 1929.

Government exhibit number 1 is the return we had under investigation at that time with Mr. Harry Murdock. Harry Murdock, whose name appears there, is the defendant in this case.

Government exhibit number 2 is Mr. Murdock's return for 1928 and is one of the returns we had under investigation at the time of the meeting.

There were present at that time Herman F. Kreipke, an accountant of East St. Louis; M. S. Keyes, internal-revenue agent; and Thomas Maher, another internal-revenue agent, who were cooperating with me in that investigation.

Q. Now, did you on that occasion have any conversation with Mr. Murdock?

The COURT. I take it this is preliminary to the hearing, wasn't it?

Mr. ALEXANDER. Exactly.

Mr. BANDY. But in being preliminary, it is inadmissible because it is apparently for the purpose of, by circuitous methods, doing something that they can not do directly.

Mr. ALEXANDER. Not at all.

Mr. BANDY. Whatever he said or didn't say at some other time and place is wholly immaterial to the charge in this indictment.

The COURT. Why isn't that true?

38 Mr. ALEXANDER. There is a question of willfulness here, and that is why I think it is material.

The COURT. Objection overruled. Proceed.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The WITNESS. I did.

Mr. ALEXANDER. Will you state what was said by you in that connection, and what was said by Mr. Murdock on that occasion?

The WITNESS. I asked him—well, preliminary to that Mr. Murdock asked why Mr. Keys hadn't come to him for the information which he had been obtaining from various parties in Madison County. He stated that if he had come to him he would have given him the information. And I spoke up and said "Well, Mr. Murdock, that is just what we are here for, for information; and if you are ready to divulge the information will you tell us to whom you paid twenty-four thousand dollars in 1927 and 1928?"

Mr. BURKE. Now, if the Court please, here is the offense charged in this indictment: That at a certain specified time and place this defendant refused and failed to give certain information to a cer-

tain designated officer, an officer designated by the Commissioner of Internal Revenue, and the date is specified in that indictment. Now, we are here prepared to try that charge; we are not here prepared to defend a charge of refusal to give information in September 1929, to an entirely different person than the person named in the indictment, a person not shown to have been designated by the Internal Revenue Commissioner, as stated in the indictment. And we therefore object to this testimony because it is incompetent, irrelevant, and immaterial, and does not tend to prove any issue created by this indictment and the plea thereto; and we move that the answer so far given be stricken.

The COURT. I take it that you didn't hear the objection made by your associate counsel. He made precisely the same objection and for the same reasons, and the court overruled the motion. We will have to overrule this one. Proceed.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The WITNESS. He said "That is commissions." I said "Very well"; will you tell us to whom it was paid?" and he said "I don't remember." I said "Now, you don't expect us to believe that you paid out twenty-four thousand dollars and don't know to whom you paid it?"

39 Mr. BANDY. Now, we object to that part of the answer and ask that the court instruct the jury to disregard it, and that it be stricken from the record.

The COURT. Objection overruled.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mr. BANDY. His statement to this witness as to whether he did or did not remember. Now, if the court please, I want to add this additional thought to the objection if permitted: That whether or not information furnished at such a hearing by this defendant was true or false is wholly foreign to the thing at issue here. He is asked to supply information pursuant to a summons. Now, if he gave information at the hearing before the internal revenue agent, Kirk, that is contradicted by information that he had prior to or subsequently given to this witness or someone else, that is wholly immaterial. The falsity or the truth of what was stated by the defendant to that internal revenue agent is not material to this proceeding.

The COURT. You mean at any other time and place?

Mr. ALEXANDER. We are not charging anything false.

The COURT. Let me see that indictment.

(Court examines indictment.)

Mr. ALEXANDER. We are not charging anything of a false nature.

The COURT. Objection overruled. Motion denied.

(To which rulings of the court, the defendant, by his counsel, then and there duly excepted.)

The COURT. And for the benefit of counsel, we might consider the objection made and the motion renewed as to all of this line of testimony.

Mr. BANDY. And——

The COURT. And the motion denied—without doing it every time a question is asked.

Mr. BANDY. And of course, exceptions to the rulings?

The COURT. There will be an exception to every ruling.

Mr. BANDY. Now, if Your Honor please, in the light of that ruling, the defendant asks that a juror be withdrawn and the case continued, because of the injection of this testimony that the defendant considers immaterial, and that he was in no wise apprised of it by the indictment and that he could not in any way anticipate or prepare for, and requires the presence here as a witness for the defendant of this Mr. Kreipke that this witness mentions, and it would be utterly impossible for him to be here today at this trial. We are unprepared to proceed with the trial in this situation.

The COURT. Objection overruled. Motion denied. Proceed.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mr. ALEXANDER. Now, will you continue to state what the conversation was?

The WITNESS. After I had stated that—after I had asked him if he expected us to believe that he didn't remember to whom he paid the twenty-four thousand dollars, he said that he would not tell us, that he would pay the tax on that amount. I might state that prior to this——

The COURT. Do you mean that he said he would tell?

The WITNESS. He would not tell to whom he paid it.

The COURT. Wait a minute; you said he would not tell to whom he had paid——

The WITNESS. To whom he had paid the money.

The COURT. Paid the tax?

The WITNESS. To whom he had paid the twenty-four thousand dollars. That he would not tell that, but he would pay the tax on that amount.

The COURT. Proceed.

The WITNESS. Prior to my questioning him I showed him my pocket credentials, which he asked for, and he said "All right; I thought maybe you might be a prohibition agent."

Mr. BANDY. Well, we object to that and ask that that be stricken, Your Honor, because it is wholly immaterial.

The COURT. Let it stand for what it is worth.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mr. ALEXANDER. That is all.

The COURT. As a result of that conversation did you do anything?

The WITNESS. Well, as a result of that conversation we concluded——

Mr. BANDY. We object to that answer and ask that it be stricken.

The COURT. Not what you concluded; what you did.

The WITNESS. We continued the investigation without the information.

Mr. BANDY. We object to the last part of the answer—that he did it "without the information", and ask that that be stricken.

41 The COURT. That may be stricken. It may stand that he continued the investigation.

Mr. ALEXANDER. I would like to ask one additional question.

The COURT. All right, go ahead.

Mr. ALEXANDER. Did you make a report of the result of your investigation to anyone?

The WITNESS. I did.

Mr. ALEXANDER. To whom?

Mr. BANDY. We object to that because it would be immaterial under the issues fixed by the indictment and the plea.

The COURT. He may answer.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The WITNESS. To the Chief of the Intelligence Unit, Washington, D.C.

The COURT. What chief of intelligence unit?

The WITNESS. The Bureau of Internal Revenue has an Intelligence Unit.

The COURT. Well, say so; there are half a dozen of them.

Mr. ALEXANDER. And that unit is a part of the Bureau of Internal Revenue?

The WITNESS. Yes, sir.

Mr. ALEXANDER. That is all.

Mr. BANDY. That is all.

Mr. BURKE. Motion to strike all of the testimony of this witness with respect to conversations with the defendant in September 1929, on the grounds already stated in the objection.

The COURT. Motion denied. Call your next.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mathew S. Keyes was called as a witness on behalf of the Government and testified as follows, to wit:

I live in Quiney, Illinois, and have been engaged as an internal revenue agent since 1918. Am acquainted with the defendant Harry Murdock. I remember the occasion, September 17, 1929, when Mr. Waterbury had a conversation with Mr. Murdock in the office of Mr. Kreipke, in East St. Louis.

42 Mr. BANDY. Apparently, if the court please, this is the same conversation that was described by the witness Waterbury.

Mr. ALEXANDER. It is.

Mr. BANDY. Is it understood that the same objections are made by the defendant?

The COURT. If you wish, we may consider the same objections extended to the entire testimony of this witness as to this conversation.

Mr. BANDY. Yes, sir.

The COURT. Same motions made, and same rulings.

(To which rulings of the court, the defendant, by his counsel, then and there duly excepted.)

We met to carry on an investigation of the income-tax liability of Mr. Murdock. Mr. Waterbury was present, Mr. Maher, Mr. Kreipke, and myself. Mr. Murdock had met Mr. Waterbury and before being introduced looked over at me and made the remark that he thought I was a gentleman. I replied that I thought I was, and he asked me why I didn't come to him for information instead of running around asking all of the preachers—using vile names—for information about him. At that Mr. Waterbury interrupted and stated if he was willing to cooperate with the Government that he was going to ask him at that time what certain payments made in the book of Mr. Murdock meant. The entries in there of two thousand dollars each month for twelve months in each of the years 1927 and 1928. Mr. Murdock told Mr. Waterbury that he did not remember what they were for. Mr. Murdock said "You cannot expect us to believe that you paid that much money."

Mr. ALEXANDER. Did you make any report to anyone of this occurrence?

A report was made in the regular course of our reports that we make in all cases to Mr. John R. Kirk, at Springfield.

Cross examination

I did not report to Mr. Kirk, in Springfield, that Mr. Murdock was willing to pay any tax on these deductions that we were inquiring about there. Mr. Murdock told Mr. Waterbury that he was willing to pay any tax that might be computed on that money that we were asking about. I reported it to Mr. Kirk, but not in the report.

43 I did not report to Mr. Kirk that Mr. Murdock had said that he was willing to pay any tax that might be computed on that money that we were asking about.

The COURT. Let the record show the same motion on behalf of the defendant. Motion denied.

(To which ruling of the court the defendant, by his counsel, then and there duly excepted.)

Cecelia M. Conlon was called as a witness on behalf of the Government, and testified as follows, to wit:

I have lived in Springfield, Illinois, all my life and am employed by Mr. John R. Kirk, internal-revenue agent in charge, at Springfield, Illinois. I was so employed on January 9, 1930, and was in Edwardsville, Illinois, on that occasion in connection with my official duties. I attended the hearing on that date at which Mr. Harry Murdock, the defendant in this case, Mr. John R. Kirk, Mr. George

Moore, and Mr. Dwight Green were present. I kept a record on what occurred at that meeting and have those notes. I took them in shorthand and transcribed them.

Government exhibit number 6 is the original copy of the memorandum of the hearing that is transcribed from my notes of the hearing at Edwardsville in regard to Mr. Murdock's income-tax case. I truly and correctly transcribed my shorthand notes and this exhibit correctly and truly shows what was said by the various men who were present at that meeting.

Mr. ALEXANDER. We offer Government exhibit 6.

Whereupon the prosecution offered in evidence Government exhibit 3.

Objection of the defendant on the ground that there has not been any evidence introduced to show any authority upon the part of the Commissioner of Internal Revenue at Washington to issue such a paper as this, which the witness has referred to as a "designation" to him, which objection was overruled, to which ruling defendant, by his counsel, then and there duly excepted.

Whereupon the prosecution offered in evidence Government exhibit 4 and 5, being the two subpenas and the returns thereof, to which there was no objection.

The said Government exhibit number 3, 4, and 5 are in words and figures following, to wit:

44 *Government exhibit number three*

TREASURY DEPARTMENT,
Washington, Dec. 20, 29.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to GC:P:TMT A-239950.

Mr. JOHN R. KIRK,
Internal Revenue Agent in Charge,
Springfield, Illinois.

In re: Harry Murdock, Nameoki, Illinois

By virtue of the authority vested in me by section 1104 of the Revenue Act of 1926 and section 618 of the Revenue Act of 1928, you are hereby authorized to require the attendance of the above-named individual and to take his testimony in connection with matters arising under the internal-revenue laws and to require him to produce any books, papers, records, or memoranda for examination in connection with such matters.

ROBT. H. LUCAS, *Commissioner.*

45 *Government exhibit number four*

Treasury Department, U.S. Internal Revenue. Form 860.

Summons to appear, to testify, and to produce books, etc.

In the matter of Harry Murdock, 8th internal-revenue collection district of Illinois, for the year 1927.

Received Springfield division Dec. 30, 1929, internal-revenue agent in charge.

The Commissioner of Internal Revenue To Harry Murdock, Residing at Nameoki, Illinois, Greeting:

You are hereby summoned and required to appear before the undersigned internal-revenue agent in charge, 303½ East Monroe Street, Springfield, Illinois, on the 30th day of December 1929, at 10:00 o'clock in the forenoon, to give testimony with reference to the following matter and to bring with you all of your books and papers, not previously examined by the agents of the Bureau of Internal Revenue, concerning the same, to wit:

Referring to your income-tax return for the calendar year 1927, sworn to by yourself and filed with the collector of internal revenue for the eighth internal revenue collection district of Illinois, and referring also to section 256 of the Revenue Act of 1926, requiring information at the source with reference to payments by you of $1,500.00 or more in certain cases, and of $3,500.00 or more in other cases, to persons required by law to pay income taxes upon moneys so paid to them by you, and referring further, to section 1104 of the Revenue Act of 1926, authorizing the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, by any officer or employee of the Bureau of Internal Revenue, to require the attendance of any person having knowledge in the premises, and take his testimony with reference to the matter required by law to be included in such return, the above request is made.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States for
46 the district in which you reside, to compel your attendance, testimony, and production of books, etc., and/or to indictment under section 1114 (a) of the Revenue Act of 1926.

Witness my hand this 23rd day of December 1929.

JOHN R. KIRK,
U. S. Internal Revenue Agent in Charge.

Delivered at 2:30 P.M. Dec. 27, 1929.

H. J. WHITE,
Internal Revenue Agent.
NICK G. ZIESER,
Internal Revenue Agent.

15760—33——3

Government exhibit number five

Treasury Department, U.S. Internal Revenue. Form 860.

Summons to appear, to testify, and to produce books, etc.

In the matter of Harry Murdock, 8th internal-revenue collection district of Illinois, for the year 1928.

Received Springfield Division Dec. 30, 1929, internal revenue agent in charge.

The Commissioner of Internal Revenue To Harry Murdock, Residing at Nameoki, Illinois, Greeting:

You are hereby summoned and required to appear before the undersigned internal-revenue agent in charge, at 303½ East Monroe Street, Springfield, Illinois, on the 30th day of December 1929, at 10:00 o'clock in the forenoon to give testimony with reference to the following matter and to bring with you all of your books and papers, not previously examined by the agents of the Bureau of Internal Revenue, concerning the same to wit:

Referring to your income-tax return for the calendar year 1928, sworn to by yourself, and filed with the collector of internal revenue for the eighth internal revenue collection district of Illinois, and especially to schedule A (income from business or profession), item 10, "Salaries, exclusive of 'labor,' reported on line 2
47 (Do not deduct compensation for your own services), $28,-175.14", and referring also to section 148 of the Revenue Act of 1928, requiring information at the source with reference to payments by you of $1,500.00 or more in certain cases, and of $3,500.00 or more in other cases, to persons required by law to pay income taxes upon moneys so paid to them by you, and referring, further, to section 618 of the Revenue Act of 1928, authorizing the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, or by any officer or employee of the Bureau of Internal Revenue, to require the attendance of any person having knowledge in the premises, and take his testimony with reference to the matter required by law to be included in such return, the above request is made.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States for the district in which you reside, to compel your attendance, testimony, and pro-

duction of books, etc., and/or to indictment under section 146 (a) of the Revenue Act of 1928.

Witness my hand this 23rd day of December 1929.

JOHN R. KIRK,
U.S. Internal Revenue Agent in Charge.

Delivered at 2:30 p.m. Dec. 2, 1929.

H. J. WHITE,
Internal Revenue Agent.
NICK G. ZIESER,
Internal Revenue Agent.

(On the reverse side of each of Government exhibits four and five (form 860), appears the following:)

Excerpts from Revenue Act of 1918

SEC. 1305. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having
48 knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

SEC. 1318. That if any person is summoned under this act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Excerpts from Revenue Act of 1921

SEC. 1308. That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oath to such person or persons.

SEC. 1310. (a) That if any person is summoned under this act to appear, to testify, or to produce books, papers, or other data, the

district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Mr. ALEXANDER. Six, as I understand it, has already been admitted. We want to offer to read the exhibits to the jury or have an understanding that they will go to the jury.

Mr. BANDY. The defendant asks that the transcript exhibit be read. The argument to the jury will be unintelligible without that.

The COURT. You can read it to the jury.

Whereupon Government exhibit number 6 was read to the jury, the same being in words and figures following, to wit:

49 *Government exhibit number six*

Mr. KIRK. This meeting held at Edwardsville, Madison County, Illinois, at 2:30 p.m. on January 9, 1930, is in response by Harry Murdock, Nameoki, Illinois, to a summons served on him at 2:30 p.m., December 27, 1929, by Internal Revenue Agents Hezie J. White and Nick G. Zieser.

Mr. MOORE. Q. I would like to be furnished with a copy of the memorandum of this hearing.

Mr. GREEN. A. You will be furnished with a copy.

Mr. KIRK. Mr. Murdock, before proceeding any further with this hearing I will administer the following oath to you:

Q. "Do you solemnly swear that the testimony you shall give in the matter now on hearing will be the truth, the whole truth, and nothing but the truth, so help you God?"

Mr. MURDOCK. A. Yes; I do.

Mr. MOORE. Q. What is the purpose of this investigation, and what is it proposed to investigate?

Mr. KIRK. A. As stated in the summonses, we are asking Mr. Murdock to supply information in connection with certain moneys which are a factor in determining the income-tax liability of certain individuals, or which may be a factor in determining whether or not such parties have paid the amount of income tax due the Government for certain years.

Mr. MOORE. As I understand it, this summons stated that it was an investigation of the income-tax returns of Mr. Murdock for the years 1927 and 1928. In that connection I would like to state that Mr. Murdock is anxious to cooperate with the officials in every way that he possibly can to the end that the Government should receive every penny of the tax to which it may be entitled; state further that in making up his income-tax returns for the years 1927 and 1928, Mr. Murdock employed an accountant to make up his income-tax returns for those years, gave to him the information regarding his income and the deductions he supposed he was entitled to claim; that the accountant employed by him made up his returns and certain payments amounting to $12,000.00 in each of those years that he

deemed were deductible items he took advantage of; that in 1927 there was $12,000.00 that he thought he was entitled to deduct and he erroneously failed to include that amount in the return in setting up the gross income, and when he made out his return for 1928 he determined that he handled it improperly in 1927 and included this $12,000.00 item in the gross income and claimed it as a deductible item claiming the benefit of it as a deduction. Mr. Murdock had his returns made up by an accountant, and the same accountant made up the return for Mr. Murdock's associate, Mr. Oscar Shookmann, and this $12,000.00 item that I mentioned in connection with Mr. Murdock's return was half of a total of $24,000.00 in payments made by the two partners, Murdock & Shookmann, and that amount the taxpayer, in this case Mr. Murdock, desires to waive any claim to the benefit of it and is willing to have the $12,000.00 item included in his gross income for each year 1927 and 1928 without making any claim for any deduction as to that amount. Further, in connection with that, I desire to say that while these gentlemen made their individual returns that they did not make a partnership return, which they should have made, and I desire to offer at this time for the purpose of getting this matter in good shape as possible to cause them to make the information return as partners so as to set out all facts clearly, and also if the Internal Revenue Bureau desires it, have Mr. Murdock file an amended return for the year 1927 so as to show the inclusion of this amount which was deducted before the return was made in the year 1927.

50

Q. Do you desire to have them file those returns, Mr. Kirk?

Mr. KIRK. A. If those returns are required, Mr. Moore, I think they should be filed even though they are delinquent returns. There has been some doubt in my mind as to whether or not a partnership existed. That is a question that was never satisfactorily cleared up during the original examination.

Mr. MURDOCK. It could have been if we knew the agents were looking for the partnership books.

Mr. MOORE. Mr. Murdock states that his books show a monthly division between him and his partner.

Mr. KIRK. The hearing had is not for the purpose of determining Mr. Murdock's income tax liability solely. The summonses which were issued called upon Mr. Murdock to furnish certain information regarding certain moneys paid to others.

Mr. MOORE. Mr. Murdock stands perfectly willing to furnish all such information as he can in respect to any payments that he may have made, but it is my understanding that he is summoned here to investigate his returns as to his income in regard to certain items which he deducted, and I wish to show in the record that he waives claim to those deductions and in view of his waiver I desire to have the record show an objection to any further examination of the taxpayer.

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Mr. KIRK. The summonses do not raise the question as to whether or not these items are proper deductions to Mr. Murdock, but asks that he advise the names of the people to whom these payments were made and the amounts.

Mr. MOORE. Q. Into what amounts do you inquire into, Mr. Kirk?

Mr. KIRK. A. The one specific item to which I refer is the $24,000.00 a year paid to other parties by Mr. Murdock, or by Mr. Murdock and Mr. Shookmann as partners, if you wish to consider that a partnership existed and that these payments were made by the partnership.

Mr. MOORE. In the manner in which these returns were made up there may be some confusion as to the payments in question. In the year 1927 there were certain payments made to employees and these payments Mr. Murdock claims the benefit of one-half of each payment. The other half was claimed by his partner, Mr. Shookmann. These payments are as follows:

For the year 1927:

James Tolton, Nameoki, Illinois, $4,412.05. A married man.

Tom White, Collinsville, Illinois, $3,502.95. Also married.

Wm. Ostendorf, Nameoki, Illinois, $2,845.00. A married man.

John Garner, Nameoki, Illinois, $1,780.00. A married man, I think.

For the year 1928:

James Tolton, Nameoki, Illinois, $5,090.85.

Tom White, Collinsville, Ill., $3,710.00.

Harry Lentz, Nameoki, Illinois, $3,034.40.

Wm. Ostendorf, Nameoki, Illinois, $2,682.13.

George Stearns, Nameoki, Illinois, $775.00.

This taxpayer did not know that a detailed report of such disbursements was required by the internal-revenue authorities until said detailed report was recently requested of him by the revenue agent, Mr. Kirk. He has referred such request to his attorneys for investigation, and his attorneys find that form 1099 and accompanying affidavit required on form 1096 require a statement of all disbursements made in operating a business and does not provide a method whereby the report can be made in cases where if made the taxpayer making same would be compelled to give information which would tend to incriminate and degrade and might tend to lay him liable for prosecution for criminal offenses, for imprisonment, fines, penalties, and forfeitures, and that notwithstanding the Constitution of the United States protects the taxpayer to the extent that it will not require him to give information against himself touching such matters or that may form a link in a chain of circumstances that might be used as evidence against the person giving same, the form requires such information to be given apparently, that is the form does not make any distinction between information that is not incriminating and information that is incriminating or may be such. The taxpayer is willing to prepare and execute

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form 1099 giving the names of persons and amounts paid to them respectively, who are engaged in actually assisting taxpayer in operating his business, and this information has just been furnished heretofore in this statement, and as to other disbursements made in the operation of his business which taxpayer can not give without tending to incriminate and degrade himself, taxpayer is willing to let such amounts be restored to taxable income if the internal revenue authorities believe they were not proper business deductions.

Mr. GREEN. Q. I would like to ask Mr. Moore at this time whether he has criminal prosecution under State law or whether criminal prosecution under Federal law in mind in arriving at the opinion he has just stated?

Mr. MOORE. I do not think I am required to answer that.

Mr. GREEN. I am not asking you to speak for Mr. Murdock; I am asking you to speak for yourself.

Mr. MOORE. I doubt if they have a right to require me to point out which particular law he might put himself liable, to a State law, or to a Federal law, or whether it might be both.

Mr. GREEN. Q. Is your answer that you do not wish to state? I can not tell exactly just what you are saying.

Mr. MOORE. I do not believe that you have the right to require me to answer whether I think that his answers might tend to incriminate him under the Federal law, or that they might tend to incriminate him under both Federal and State laws, and at this time
53 I do not believe that the taxpayer could be required as a witness to state as to what law he thought it might incriminate him.

Mr. GREEN. That is a question which would have to be settled at some other place other than a hearing at this time, but I would like to have this record show at this time what your answer is to my question as to whether you had violation of a State law or violation of a Federal law in arriving at the opinion you have just rendered.

Mr. MOORE. A. I think I would state that we have particularly in mind a State law.

Mr. GREEN. Q. Now, I would like to ask if the accountant who prepared Mr. Murdock's individual returns for the years 1927 and 1928 is present at this hearing?

Mr. MOORE. A. Yes, Mr. Kreipke.

Mr. GREEN. Mr. Murdock, before you are asked any questions at this hearing, I want to make it clear to you that the purpose of this hearing is not to determine your personal income tax liability for the years 1927 and 1928, but that the Government seeks at this hearing to have you give information with reference to payments of moneys made by you to persons, in order that the Government may determine whether those persons have correctly reported their income for the years 1927 and 1928 and paid the tax thereon, or if no return has been filed by those persons, to prepare and make out a return as provided by the Statute of the United States for such persons, and

before any questions are asked you, we deem it advisable to call your attention to certain Statutes of the United States under which the Government proceeding at this hearing. As you are probabaly aware, the Revenue Act of 1926 applies to the year 1927 and the Revenue Act of 1928, together with such sections of the Revenue Act of 1926 as were not repealed by that act, apply to the year 1928. The sections of those two acts which apply to this particular hearing are as follows, and I will first read section 256 of the Revenue Act of 1926:

"All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits and income (other than payments described in sections 254 and 255), of $1,500 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having
54 information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

"Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, and (2) in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by persons undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

"When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

"The provisions of this section shall not apply to the payment of interest on obligations of the United States.".

Another section of the 1926 act, which applies to this hearing reads as follows, and is section 1104:

"The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in

the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Another section of the 1926 revenue law which applies to this hearing is section 1114 (a), which is a penalty section of the revenue act, and reads as follows:

"Any person required under this act to pay any tax, or required by law or regulations made under authority thereof to make a
55 return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

Those, I believe, are all of the sections of the 1926 Revenue Act which apply directly to this hearing. Those sections of the Revenue Act of 1928 which are deemed to apply to this hearing are: Section 148, which is in identical language, I believe, to section 256 of the Revenue Act of 1926, regarding the filing of returns showing payments of $1,500 or more to any person; and section 618 of the Revenue Act of 1928, which is in identical language to that of section 1104 of the Revenue Act of 1926, which empowers the Commissioner through any agent or person designated by him to conduct a hearing similar to the one now being conducted, and requiring the persons so summoned to give information; and also, section 146 of the 1928 Revenue Act which is in identical language with that of section 1114 (a) of the Revenue Act of 1926.

A. Will you state your name please, Mr. Murdock?

Mr. MURDOCK. A. Harry Murdock.

Mr. GREEN. Q. Where do you live?

Mr. MURDOCK. A. Nameoki, Illinois.

Mr. GREEN. Q. How old are you?

Mr. MURDOCK. A. Forty-seven.

Mr. GREEN. Q. Has your home always been in Nameoki, Illinois?

Mr. MURDOCK. A. No, sir.

Mr. GREEN. Q. Where did you live prior to the time you came to Nameoki?

Mr. MURDOCK. A. East St. Louis.

Mr. GREEN. Q. How long have you lived in Nameoki?

Mr. MURDOCK. A. About eight years.

Mr. GREEN. Q. What has been your business there?

Mr. MURDOCK. A. Real estate for the last two years.

Mr. GREEN. Q. Have you just been in real estate business the last two years?

Mr. MURDOCK. A. Yes, sir.

Mr. GREEN. Q. You mean by that the years 1928 and 1929?
56 Mr. MURDOCK. A. Well, I started in 1926.
Mr. GREEN. Q. Then you have been in real estate business three years.
Mr. MURDOCK. A. About that.
Mr. GREEN. Q. Has that been your only business?
Mr. MURDOCK. A. I refuse to answer.
Q. On what ground?
A. On the ground that I might give information that might incriminate and degrade myself.
Q. Do you have in mind the violation of a Federal law or State law when you state your ground in that you might give information to incriminate or degrade yourself?
A. Against a State law.
Q. And not against a Federal law? Is that right, Mr. Murdock?
A. Not that I know of.
Mr. MOORE. I object to that question on the ground that it is immaterial; that the Government has no right to insist upon an answer as to what would be a State or Federal statute in connection with which the witness might tend to incriminate himself.
Mr. GREEN. Q. Mr. Murdock, did you operate or have supervision over the operation of any slot machines, coin-operated machines, during the years 1927 and 1928?
Mr. MURDOCK. A. Vending machines.
Q. You mean gambling machines?
A. I think that's what they are called.
Q. How many machines did you have in operation during the years 1927 and 1928?
A. I can't tell you off-handed.
Q. Approximately?
A. Around 125 or something like that.
Q. In both years?
A. Yes, about the same amount.
Q. In what territory were those machines operated?
A. Madison County.
Q. Madison County alone?
A. Yes.
Q. What towns in Madison County?
A. I refuse to answer.
Q. On what ground?
A. That I might incriminate or degrade myself.
Q. And in stating you refuse to answer that you might
57 incriminate or degrade yourself, you have in mind the violation of a State Law and not a Federal Law?
A. Yes.
Mr. GREEN. Q. You could not operate those machines without the consent of certain public officials, could you Mr. Murdock?
Mr. MURDOCK. A. It has been done.

Q. Where was it done without the consent of public officials?

A. It has been done other places.

Q. Is it being done now without the consent of public officials?

Mr. MOORE. I object to that question as being too broad in its scope, as it is not particular enough in its inquiry.

Mr. GREEN. All right, strike out that question.

Q. Mr. Murdock, are you at the present time operating any slot machines without the consent of public officials?

Mr. MURDOCK. A. I refuse to answer.

Q. On what ground?

A. That I might give information which might incriminate or degrade myself.

Q. And in stating that you refuse to answer because you might give information which might incriminate or degrade yourself, you have in mind the violation of a State law and not a Federal law?

A. Yes.

Q. In 1927, Mr. Murdock, were you operating slot machines without the consent of public officials?

A. I refuse to answer.

Q. On what ground?

A. Same ground.

Q. Please state the ground.

A. That I might give information which might incriminate or degrade myself.

Q. And in refusing to answer on the ground that you might incriminate or degrade yourself you have in mind the violation of a State law and not a Federal law, Mr. Murdock, is that right?

A. Yes.

Q. Did you in 1928 operate slot machines without the consent of public officials?

A. I refuse to answer.

Q. On what ground.

A. On the same ground.

58 Q. Please state the ground.

A. That I might incriminate or degrade myself.

Q. And in refusing to answer on the ground that you might incriminate or degrade yourself, you have in mind the violation of a State law and not a Federal law?

A. Yes.

Mr. GREEN. Your returns for the years 1927 and 1928 were made out by Mr. Kreipke, who is present at this hearing?

Q. You gave him the information from which he made up the returns?

Mr. MURDOCK. A. Yes, sir.

Q. Did Mr. Kreipke to your knowledge gain any information with respect to making up your returns for the years 1927 and 1928 from any source other than yourself?

A. I don't think he did.

Q. Mr. Murdock, it appears that Mr. Kreipke in making out your return for the year 1927 did not include in the item of gross income which was set forth on your 1927 return, an amount of $24,000.00, and it appears from his working papers in connection with your 1927 return and which he used in making up your return that the $24,000.00 was paid by you to persons as commissions. To whom did you pay that $24,000.00?

A. I refuse to answer.

Q. On what ground?

A. Same ground. It might incriminate myself.

Q. In stating the ground for your refusal to answer you have in mind the violation of a State law and not the violation of a Federal law?

A. Yes, sir.

Q. Out of that sum of $24,000.00 did you pay $1,500.00 or more to any one single person during the year 1927?

A. I refuse to answer.

Q. On what ground?

A. I only made one half of the payments.

Q. Well, out of $12,000.00 which you say you paid, did you pay $1,500.00 or more to any one single person during the year 1927?

A. I refuse to answer.

Q. On what ground?

A. I refuse because it might incriminate or degrade myself.

Q. Now, out of the $24,000.00 paid in the year 1927, or the
59 $12,000.00 which you say was your share which you paid, did you pay $3,500.00 or more to a married person during the year 1927?

A. I refuse to answer.

Q. On what ground?

A. I might give information to incriminate or degrade myself.

Q. In stating your ground for refusal that you might incriminate or degrade yourself you have in mind the violation of a State law and not the violation of a Federal law?

A. Yes.

Mr. GREEN. Q. Mr. Murdock, in the return you filed for yourself for the year 1928 there appeared in schedule A of that return, "Total income from business or profession", and also a notation, "Do not deduct compensation for your own services"; an amount of $28,175.14. Is there included in that sum or amount of $28,175.14 an amount of $24,000.00 which has been referred to at this hearing as being the amount of commissions or salaries paid to certain persons by a partnership consisting of Mr. Shookmann and yourself, or the amount of $12,000.00 which your counsel has stated was the amount paid by yourself during the year 1928?

Mr. MURDOCK. A. $12,000.00.

Q. Well, is not the total amount of $24,000.00 included in that figure of $28,175.14?

Mr. MOORE. He has answered the question by stating $12,000.00.

Mr. GREEN. You did not file any partnership return for either the year 1927 or 1928?

Mr. MOORE. He has stated $12,000.00, and your statement stated that the total payment is $24,000.00, and $12,000.00 was all that was paid by him.

Mr. GREEN. Mr. Murdock, your attorney, Mr. Moore, read certain figures here and the names of persons to whom the amounts of money were paid making up this money which totalled $15,292.38. Were the amounts making up that total included in the total of $28,175.14 appearing in your return for the year 1928 under schedule A, "Income from business or profession?"

Mr. MURDOCK. A. Half of the total of $15,292.38 is included in the figure $28,175.14.

Q. According to my figures, then the total of $7,646.19 is included in the figure of $28,175.14 appearing under schedule
60 A, "Income from business or profession", in your return for the year 1928. Is that right, Mr. Murdock?

A. I think it is.

Q. Mr. Murdock, according to the figures which have been given here, you have, through your attorney, Mr. Moore, accounted for the payment of $7,646.19, that being one half of $15,292.38, which appears in the record here. Now, that leaves a balance of that figure of $28,175.14 of $20,528.95 to be accounted for. To whom did you pay that money?

A. I refuse to answer.

Q. On what ground?

A. I might incriminate or degrade myself.

Q. And in stating that your ground for refusal to answer is that you might incriminate or degrade yourself you have in mind the violation of a State law and not the violation of a Federal law? Is that right?

A. Yes, sir.

Mr. MOORE. There is an item of $9,350.00 that is included in that deduction as a matter of incidental expenses without classification that was expended by Mr. Murdock himself in connection with the business in which he was engaged.

Mr. GREEN. Q. Was that expended in connection with your slot-machine business or real-estate business?

Mr. MURDOCK. Slot-machine business. That was spent by me in going around with my customers trying to find locations for their machines.

Mr. MOORE. Q. What sort of expense was that, Mr. Murdock?

Mr. MURDOCK. A. A man running my business cannot walk into a soft-drink parlor without buying the house a couple of drinks.

Mr. GREEN. Did you keep a record of these expenditures?

Mr. MURDOCK. A. Yes, sir.

Mr. GREEN. Q. And by buying a drink for the "house" you mean for whoever was in there?

Mr. MURDOCK. A. Yes, sir.

Q. That is what you might call the promotion of "Good will?"

A. Yes, sir.

Mr. KIRK. Q. Mr. Murdock, I believe it is your statement that included in the sum of $28,175.14 deducted on your return in the year 1928 is an item of one half of $12,000.00 of the $24,000.00
61 annual payment which has been referred to; that is, one half of this amount was deducted on your return and one half on the return of Mr. Shookmann. There has been submitted an amount of $7,646.19 as representing your one half of amounts paid to certain individuals in 1928. Do you mean to state that this amount of $15,292.38 is a portion and all included in the $24,000.00?

Mr. MURDOCK. A. No.

Q. Mr. Murdock, I will ask you as to the $24,000.00 paid during the year 1928 and of the $24,000.00 paid during the year 1927, by the firm of yourself and Mr. Shookmann, to state the names of the recipients and amounts paid to each.

A. I refuse to answer.

Mr. GREEN. Q. On what ground?

Mr. MURDOCK. A. I might incriminate or degrade myself.

Mr. GREEN. Q. And in stating your ground for refusal to answer that you might incriminate or degrade yourself, you have in mind the violation of a State law and not the violation of a Federal law?

Mr. MURDOCK. A. Yes, sir.

Q. Now, Mr. Murdock, there seems to be some discrepancy in the figures which have been mentioned here, and for the purpose of clearing the record let us again state those figures. Out of the total of $28,175.14 you show and wish to account for a part of that total in this manner, namely: $7,646.19, which represents your half of certain payments made to individuals, whose names and amounts were read into the record here by your attorney, Mr. Moore. That is right so far, is it?

Mr. MURDOCK. A. Yes.

Q. And for the sum of $8,529.00, which represents half of a total of $17,058.00, paid by yourself and your partner, Mr. Shookmann, as miscellaneous expenses such as buying of drinks in a prospective customer's place. That accounts for $16,175.19 out of the figure of $28,175.14. Is that right?

A. That is right.

Q. As to the balance, which is approximately $11,999.95 you wish to go on record as refusing to state the names of the persons or recipients of that money or the amounts paid such persons?

A. Yes, sir.

Q. And you refuse to answer on the ground that such answer may tend to incriminate or degrade you?

A. Yes.

62 Q. Mr. Murdock, do you know a man by the name of George Little?

A. Yes.

Q. How long have you known him?

A. Fifteen years.

Q. Do you know what business he is in?

A. No; I do not.

Q. Has your association with him been of a social or business nature?

A. Social.

Q. Have you ever had any business transactions with George Little?

A. I refuse to answer.

Q. On what ground?

A. Same ground.

Q. Please state the ground.

A. I might incriminate myself.

Q. In stating that your ground for refusal to answer is that you might incriminate yourself, you have in mind the violation of a State law and not the violation of a Federal law?

A. Yes, sir.

Mr. GREEN. Q. Out of the sum of $12,000.00 which you say you paid in the year 1927 and for which you refuse to account for and refuse to reveal the names of the recipients and amounts paid to such recipients, did you pay any of that $12,000.00 to George Little?

Mr. MURDOCK. A. I refuse to answer.

Q. On what ground?

A. I might incriminate myself.

Q. Out of the sum of $12,000.00 which you say you paid during the year 1928 and for which you refuse to account for with respect to which you refuse to give or reveal the names of the recipients or amounts paid such recipients, did you pay any of that $12,000.00 to George Little?

A. I refuse to answer.

Q. On what ground?

A. I might give information that might incriminate myself.

Q. In stating your ground for refusal to answer that you might give information that might incriminate yourself, you have in mind the violation of a State law and not the violation of a Federal law?

63 A. Yes.

Q. Have you any questions which you might wish to ask at this time, Mr. Moore?

Mr. MOORE. I have no questions that I desire to ask.

Motion to exclude testimony

Mr. BURKE. Now, if the court please, we move to exclude all of the testimony relating to the questions propounded and answers made by the defendant at the alleged hearing or meeting at Edwardsville, Ill., on January 9, 1930, for the reason that the same neither

proves nor tends to prove the commission by the defendant of any offense against any valid law of the United States, and more specifically we assign the ground that section 1104 of the Revenue Act of 1926 (title 26, sec. 1247 U.S.C.) and section 618 of the Revenue Act of 1928 (the identical section appearing in the Revenue Act of 1926) under which the said hearing was had, neither in themselves nor by reference to any other statute of the United States, contain any provision for immunity to a person testifying by virtue thereof, from prosecution by reason of such testimony, and that by reason of such omission and deficiency the said statutes are violative of the provisions of the fifth amendment to the Constitution of the United States, and that the said sections are unconstitutional and void.

The COURT. That is section 618?

Mr. BURKE. Now, then, I assume that the same objection to section 1114 (a) under which the indictment is drawn is saved; of course, that will be saved upon the motion for a directed verdict.

The COURT. Section 1114 (a) of the Revenue Act of 1926 and section 146 (a) of the Revenue Act of 1928, are section 2146 of title 26, U.S.C.

Mr. BANDY. The objection does not go to the offer of proof or the form of it, but to the materiality of the testimony—that is, the form in which it is offered, as to the stenographic report; we will concede that is proper.

The COURT. The jury may be at ease three or four minutes. (Jury retires with the officer.)

This motion involves the precise question that the Government and counsel for the defendant sought to raise by the special pleading method, and which the Supreme Court of the United States
64 held was improper, and reversed the holding heretofore made by this court. And therefore the motion is denied.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

(After a short recess, the jury returns into court.)

The COURT. Call your next witness.

Mr. ALEXANDER. The Government rests.

The COURT. Evidence closed on behalf of the Government.

Defendant's motion for directed verdict

Mr. BANDY. We have a motion for a directed verdict at the close of the Government's case.

The COURT. Motion by the defendant at the close of the Government's evidence to instruct the jury to return the following verdict: "We, the jury, find the defendant not guilty." Motion denied.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mr. BANDY. Now, the defendant will offer no evidence. Defendant rests. And we have another motion to direct.

The COURT. Defendant rests. At the close of all of the evidence, Defendant Murdock moves the court to instruct the jury to return the following verdict in this case: "We, the jury, find the defendant not guilty." Motion denied.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

The foregoing is all the evidence offered or introduced by either party upon the trial of said cause.

Charge to jury

The COURT. Gentlemen of the jury, when you retire to your jury room, the court will permit you to take with you the indictment in this case. You will be permitted to take the indictment with you for one purpose and one purpose only, and that is that you may accurately inform yourselves as to nature and character of the several charges laid against the defendant. The indictment is not evidence and will not be considered as evidence by you.

The first count of the indictment charges that the defendant wilfully refused to give testimony and information concerning his income tax return. The other count is in similar form and is
65 substantially to the same effect, with the difference concerning the name and address or the names and addresses of the recipient or recipients of such payments, that is, of the twelve thousand dollar payments which you have heard discussed.

Gentlemen of the jury, to this indictment the defendant had heretofore entered his plea of not guilty.

This prosecution is based upon two statutes, the first being section 1247 of title 26 of the United States Code: "Examination of books, papers, and records; taking testimony. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

The other statute is section 2146 of title 26 of the United States Code, which provides that "Any person required under this title to pay any tax, or required by law or regulations made under authority hereof to make a return, keep any records, or supply any information for the purposes of the computation, assessment or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the

time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof" shall be punished. I interpolate the words "shall be punished" for the words contained in the statute for the reason that you are in no way concerned with any matter of punishment. Any question of punishment is a matter that devolves upon the court. You have no duty and no responsibility in connection with such matters except to advise the court as to the ultimate fact as to whether the defendant is guilty in manner and form as charged in the indictment or in some count thereof, or not guilty.

66 Gentlemen of the jury, you will begin the consideration of this case by giving this defendant the benefit of the presumption of innocence and, of course, that presumption obtains throughout the trial and is to find crystalization in a verdict of not guilty, unless you find from the evidence that he is guilty in manner and form as charged in the indictment or some count thereof beyond a reasonable doubt. Then proof to that extent overcomes the presumption of innocence.

You will observe that the offense charged here is the willful failure or refusal to furnish information. That means, gentlement of the jury, that having an opportunity to do so he deliberately designed not to furnish the information.

In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the revenue agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the State law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the State law. You are instructed, gentlemen of the jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent.

Gentlemen of the jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt. If you don't think so, then you should find him not guilty. That is your privilege. If you do think so, then that is the end of the case and your verdict will be one of not guilty.

Is there any suggestion on behalf of the Government?

Mr. LEMON. In the last sentence, Your Honor, I think you made a little mistake; you said they should find him "not guilty."

The COURT. Well, so that there will be no mistake about
67 that—I may have misspoken myself: If you think that the Government has proved that the defendant willfully refused to give information, as charged in the indictment, beyond a reasonable doubt, then your verdict would be "guilty"; if you believe from the evidence that the Government has not proved that he willfully refused to give information, as charged in the indictment, then your verdict would be "not guilty." Any further suggestion?

Mr. LEMON. None.

The COURT. Any suggestion on behalf of the defendant?

Mr. BURKE. We suggest that the court instruct the jury that before they can find the defendant guilty of the charge in this indictment they must find beyond a reasonable doubt not only that he did willfully refuse to give information, but that that information which he refused to give was material to the assessment, computation, or collection of income taxes—that that must be proved as an essential element of the offense, and beyond a reasonable doubt.

The COURT. The jury may consider itself so instructed. Is there anything else?

Mr. BANDY. The defendant also suggests and asks the court to give an instruction to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that they should consider that in determining whether or not his refusal to answer the questions was willful.

The COURT. That request will be refused.

(To which ruling of the court, the defendant, by his counsel, then and there duly excepted.)

Mr. BANDY. That is the only suggestion.

The COURT. As to the form of your verdict——

Mr. BANDY. We have some exceptions.

The COURT. To what?

Mr. BANDY. To that part of the charge in which the court said that he feels from the evidence in this case that the Government has met the burden placed upon it and has proved the defendant guilty beyond a reasonable doubt, as being an unfair and an unreasonable usurpation of the province of the jury in this case.

The COURT. You may have the exception.

Mr. BURKE. We desire to further except to that part of the
68 court's charge in which the court advises the jury that the defendant had no right to refuse to answer on the ground that he might incriminate himself, particularly under the State law. We desire an exception to that part.

The COURT. You may have an exception to that part. Anything else?

Mr. BANDY. That is all.

The COURT. Gentlemen of the jury, it is possible to render any one of three verdicts in this case. If you find the defendant guilty, you will say "We, the jury, find the defendant," writing in his name, "guilty"; sign your verdict and return it into court. If you find the defendant not guilty, you will say: "We, the jury, find the defendant"—writing in his name "not guilty"; sign your verdict and return it into court.

If you should find him guilty on one count and not guilty on the other, you will say "We, the jury, find the defendant"—writing in his name—"guilty on count" whatever it may be, putting in the number of the count, "and not guilty on count number" whatever it may be. You will know that the first count is the first count because it is not numbered; the second count is numbered. So that if you should find him guilty on one count and not guilty on the other this third form will be of assistance to you.

Upon retiring to your jury room you will select one of your number to preside at your deliberations; he will be your foreman and will speak for you and in your presence in communicating with the court.

You may now retire with the officer, take with you the forms of verdict which are furnished for your assistance—not your direction—the indictment, and the exhibits admitted for your consideration, and begin your deliberations.

All exhibits were admitted, weren't they?

Mr. ALEXANDER. I understand so.

Mr. BANDY. I think so.

Verdict

Whereupon the jury retired to consider their verdict and returned thereafter, into court with a verdict in the words and figures as follows, to-wit:

"We, the jury, find the defendant, Harry Murdock guilty."

69 *Motion for new trial*

Whereupon the defendant moved the court for a new trial of said cause for the following reasons:

1. The court erred in permitting the prosecution to prove by Witnesses A. R. Waterbury and Matthew S. Keys, over the objection of this defendant, that on September 19, 1929, at East St. Louis, Illinois, the defendant stated to said witnesses in a conversation that he did not remember what had been done with the items of income involved in this case. This testimony was incompetent, immaterial, irrelevant, and highly prejudicial to the rights of defendant. There was no duty devolving upon the defendant to give any information to the said revenue agents at that time and place and, if it be true that he refused their request for such information at that time, he violated no statute in so doing.

2. The court erred, and defendant was unduly prejudiced, by the giving of a certain part of the charge to the jury in which the court stated that the court believed that the evidence had proved the defendant guilty beyond a reasonable doubt. This part of the charge to the jury constituted an unreasonable and unwarranted invasion by the court of the province of the jury, and caused the court to substitute its judgment for the judgment of the jury upon the ultimate question of fact which it was the jury's sole province to determine.

3. The defendant was prejudiced and error was committed through the refusal of the court to grant the request of the defendant to instruct the jury that if defendant's refusal to answer certain questions or to give information at the time he appeared before Internal Revenue Agent Kirk at Edwardsville, Illinois, was in good faith and was not a willful failure or refusal to give information, that fact should be considered by the jury in determining whether the failure or refusal of the defendant was willful.

4. The court erred in overruling the demurrer to the indictment because the indictment is predicated upon an invalid statute that violates that provision of the fifth amendment to the Constitution which provides that "No person shall be compelled in any criminal case to be a witness against himself."

5. The court erred in overruling the demurrer to the
70 indictment because the indictment is based upon an invalid statute, the said statute being invalid and in violation of the fifth amendment to the Constitution because, although undertaking to compel the witness to divulge information, it does not confer immunity from criminal prosecution upon such person because of the facts divulged through such compulsory testimony.

6. The court erred in admitting in evidence, over defendant's objection, exhibits which purported to be photographic copies of defendant's income-tax returns for the year 1927 and 1928. These exhibits were inadmissible because they were not the best evidence and because the original income-tax returns made by defendant for the years 1927 and 1928 were in the possession of the Government. These returns, and the facts stated in them, were also inadmissible because, although defendant was required by law to file these income-tax returns, the law did not confer immunity upon him from criminal prosecution because of the facts divulged by any statements in the said returns.

7. The court erred in denying defendant's request at the close of the evidence for the court to instruct the jury to find the defendant not guilty.

And for other good and sufficient reasons.

Said motion for the new trial was denied, to which ruling the defendant, by his counsel, then and there excepted.

Motion in arrest of judgment

Thereupon the defendant moved the court to arrest judgment upon the said verdict for the following reasons:

1. Section 1114-A of the Revenue Act of 1926, upon which count one of the indictment is predicated, and section 146-A of the Revenue Act of 1928, upon which count two of the indictment is based, are invalid and in violation of the fifth amendment to the Constitution of the United States because these sections leave the defendant subject to prosecution after being compelled to answer incriminating questions propounded to him by the internal revenue agent.

2. Section 1114-A of the Revenue Act of 1926 and section 146-A of the Internal Revenue Act of 1928, upon which acts of Congress the counts of this indictment are based, are invalid and in vio-
71 lation of the fifth amendment to the Constitution of the United States because they do not give complete protection from the perils against which the said fifth amendment was intended to guard.

3. The fifth amendment to the Constitution of the United States provides that "no person shall be compelled in any criminal case to be a witness against himself." Section 1114-A of the Internal Revenue Act of 1926 and section 146-A of the Revenue Act of 1928 violate this provision of the fifth amendment to the Constitution of the United States because they do not afford complete immunity against future prosecution for any offenses revealed by answers given by the defendant to the questions that were asked of him when he was subpoenaed to appear before the internal revenue agent as alleged in counts one and two of the indictment.

4. Each count of the indictment violates the sixth amendment to the Constitution of the United States in that each of said counts fails to inform the defendant of the nature and cause of the accusation.

5. The indictment is fatally defective and insufficient, including each count thereof, in that it does not allege the commission of any offense against the United States.

6. Each count of the indictment fails to inform the defendant of the nature and cause of the accusation in that each count fails and omits to aver what, if any, information was requested of defendant, and what, if any, questions were propounded to him.

7. The indictment, including each count thereof, is fatally insufficient because it consists only of conclusions and does not allege any facts on which the predicate the conclusions it states.

8. The averment in each of the counts of the indictment that the defendant "unlawfully did wilfully fail to give such testimony" is a mere conclusion of the pleader that this defendant is not, by law, required to answer.

9. The indictment is otherwise vague, ambiguous, argumentative, indefinite and uncertain.

Said motion was overruled by the court, to which ruling the defendant, by his counsel then and there excepted.

Thereupon the court rendered its judgment and sentence upon said verdict, which judgment and sentence is as follows, to-wit:

That the defendant pay a fine of five thousand dollars and be imprisoned for one year in the Springfield city prison.

72 To the rendition and imposition of which judgment and sentence the defendant, by his counsel then and there excepted.

And the court entered an order allowing the said defendant thirty days to present and file bill of exceptions in said cause.

Order settling bill of exceptions

Forasmuch as the matters, above set forth do not fully appear in the record, the defendant, Harry Murdock, tenders this, his bill of exceptions, and prays that the same may be signed and approved by the judge of this court.

The foregoing bill of exceptions was presented to the undersigned and lodged in the office of the clerk of this court on the 12th day of February, A. D. 1932, and within the time allowed by the said United States District Court therefor, contains all the evidence given and proceedings had upon the trial of said cause and is in all respects correct, and is hereby approved, allowed and settled, and made a part of the record herein.

Dated February 16th, 1932.

LOUIS FITZHENRY, *Judge.*

Presented, February 12, 1932.

LOUIS FITZHENRY, *Judge.*

Lodged in Clerk's office this 12th day of February, 1932.

S. T. BURNETT, *Clerk.*

[File endorsement omitted.]

In United States District Court

Petition for appeal and supersedeas

Filed Jan. 29, 1932

To the Honorable Louis FitzHenry, Judge of the above court:

Harry Murdock, the defendant in the above-entitled cause,

73 hereby petitions for the allowance of an appeal from the judgment of conviction herein, to the United States Circuit Court of Appeals for the Seventh Circuit, and prays that an order may be made superseding the execution of said judgment pending said appeal, on the execution of a bond in a sum to be fixed herein, and conditioned according to law, and that your petitioner be released on bail in an amount to be fixed by the order of this Honorable Court, pending the final disposition of said appeal.

HAROLD J. BANDY,
EDMUND BURKE,
Attorneys for Defendant.

In United States District Court

Appellant's assignment of errors

Filed Jan. 29, 1932

Comes now Harry Murdock, above-named appellant, by Edmund Burke and H. J. Bandy, his attorneys, and avers that there is manifest error in the record and proceeding in the above-entitled cause, in this:

1. The court erred in denying appellant's motion for a new trial and in entering judgment upon the verdict because the indictment and the prosecution in this case are predicated upon certain statutes, to wit, section 1114 A of the Revenue Act of 1926 and section 146 A of the Revenue Act of 1928, which are invalid and in violation of the Fifth Amendment to the Constitution of the United States which provides that "No person shall be compelled in any criminal case to be a witness against himself."

2. The court erred in overruling and denying appellant's motion in arrest of judgment because the statutes upon which the two counts of this indictment are based, to wit, section 1114 A of the Revenue Act of 1926 and section 146 A of the Revenue Act of 1928, are invalid and in violation of the Fifth Amendment to the Constitution of the United States because, although compelling appellant to give
75 testimony and information under oath in a certain hearing before an internal revenue agent at Edwardsville, Illinois, as described in the indictment, these sections of the statute did not afford absolute immunity to appellant against prosecution for criminal offenses divulged or revealed by appellant at said hearing before Internal Revenue Agent Kirk while giving such compulsory information or testimony.

3. The court erred in denying a motion made by appellant during the course of the trial, for the court to exclude and strike from the testimony, the stenographic transcript of the questions asked of appellant and the testimony given by him at the aforesaid hearing before the internal-revenue agent. This stenographic transcript was inadmissible because it violated the above set forth constitutional rights of appellant as guaranteed by the fifth amendment. This stenographic transcript was inadmissible in evidence because the testimony therein was wrung from appellant without him being afforded immunity from criminal prosecution because of any offenses divulged by such testimony.

4. The court erred in overruling the motion for new trial and entering judgment upon the verdict because the indictment in this case does not allege any offense against the United States. It fails to allege any offense because the aforesaid sections 1114 A of the Revenue Act of 1926 and 146 A of the Revenue Act of 1928, are unconstitutional because they leave appellant subject to criminal prose-

cution after he answers the incriminating questions put to him by the internal-revenue agent at the aforesaid hearing.

5. The court erred in overruling appellant's demurrer to the indictment and each count thereof because of the reasons above set forth concerning the invalidity and unconstitutionality of section 1114 A of the Revenue Act of 1926 and section 146 A of the Revenue Act of 1928.

The court erred in overruling and denying appellant's demurrer to the indictment and each count thereof, because each count of said indictment violates the sixth amendment to the Constitution of the United States, by failing and omitting to inform appellant of the nature and cause of the accusation. This is shown by the fact that each count wholly fails and omits to aver what, if any, information was requested of appellant and what, if any, questions were propounded to him.

6. The court erred in entering judgment upon the verdict
75 because the evidence in this case fails to prove that appellant "unlawfully did wilfully fail to give such testimony" as alleged in each count of the indictment. The testimony shows that at the time he refused to reply to certain questions asked of him at said hearing, appellant stated that if he should answer such questions his answers would incriminate and degrade him. His refusal to answer was not deliberate or wilful, but was because of a well founded fear of a criminal prosecution.

7. The court erred in permitting the prosecution to prove by witnesses A. R. Waterbury and Matthew S. Keys, over the objection of appellant, that on September 19, 1929, at East St. Louis, Illinois, appellant stated to said witnesses that he did not remember what he had done with the two (2) twelve thousand dollars ($12,000.00) item of income involved in this case. This testimony was incompetent, immaterial, irrelevant, and highly prejudicial to the rights of appellant. The time, place, and circumstance testified about by the said witnesses was not the time, place, and circumstance charged in the indictment.

8. The court erred in overruling and denying appellant's motion for a directed verdict because the evidence in this case fails to show a willful violation of either section 1114a of the Revenue Act of 1926 or of section 146A of the Revenue Act of 1928 and fails to show any refusal to give information material to the computation, assessment or collection of any tax imposed by either of the said revenue acts.

9. The court improperly instructed the jury, to the prejudice of the defendant, that:

"The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

for the reasons set out in the defendant's exception to said instruction.

10. The court erred in refusing, to the prejudice of the defendant, to instruct the jury, upon the request of the defendant, that:

"If you believe that the reasons, stated by the defendant in his refusal to answer questions, were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was willful."

to which refusal the defendant duly excepted.

11. The court improperly instructed the jury, to the prejudice of the defendant, that,

76 "In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the revenue agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the State law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the State law. You are instructed, gentlemen of the jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent."

to which charge the defendant duly excepted.

12. The court erred in admitting in evidence over appellant's objection, exhibits which purported to be photostatic copies of appellant's income tax returns for the years 1927 and 1928, being Government exhibits number 1 and 2, to the admission of which evidence the appellant objected and duly excepted. These exhibits were inadmissable because they were not the best evidence and because the originals thereof were in the possession of the Government. They were further inadmissable because foundation therefor was not shown by proof that the originals had been signed or executed by appellant. The exhibits were further inadmissable because the certificate thereon purported to state a fact in addition to the genuineness of the copies, to wit, that the originals were filed by Harry Murdock, Nameoki, Illinois. The said exhibits were inadmissable for the further reason that appellant was required by law to file the originals thereof and the same could not be admissable against him in any criminal prosecution.

13. The court erred in refusing to direct a verdict of "not guilty" because the evidence failed to prove the defendant guilty beyond a reasonable doubt.

Wherefore appellant prays that the judgment of the United States District Court for the Southern District of Illinois, Southern Division, in this case be set aside and held for naught and that said judgment be reversed and remanded.

HAROLD J. BANDY,
EDMUND BURKE,
Attorneys for Appellant.

[File endorsement omitted.]

77–79 In United States District Court

Order for Appeal and Supersedeas

Filed Jan. 29, 1932

The above-named defendant having filed his petition for appeal and supersedeas, together with his assignments of error, and the court having examined same, it is ordered that the defendant be allowed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit and that said appeal shall operate as a supersedeas and that no further proceedings shall be and in this cause in this court until the final determination thereof on said appeal, and that the said Harry Murdock shall be admitted to bail during the pendency of said appeal upon his entering into a good and sufficient bond in the sum of ten thousand ($10,000) dollars, to be conditioned as required by law, with sureties to be approved by the clerk of this court.

Dated this 29 day of January A.D. 1932.

LOUIS FITZHENRY,
District Judge.

[Bond on Appeal for $10,000 approved and filed Jan. 29, 1932, omitted in printing.]

80 In United States District Court

Order extending time

Filed Feb. 24, 1932

This cause having come on to be heard upon the motion of Harry Murdock, defendant, for an extension of the time within which to file a transcript of the record and docket said cause in the United States Circuit Court of Appeals, and the court being fully advised in the premises and for good cause shown, it is ordered that the time for filing a transcript of the record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, be and the same is hereby extended to and including the 29th day of March 1932.

Dated this 24th day of February 1932.

CHAS. G. BRIGGLE, *Judge.*

O.K.

FRANK K. LEMON,
U.S. Atty.

[File endorsement omitted.]

In United States District Court

Order extending time

Filed March 25, 1932

This cause having come on to be heard upon the motion of Harry Murdock, defendant, for an extension of the time within which to file a transcript of the record and docket said cause in the United States Circuit Court of Appeals, and the court being fully advised in the premises and for good cause shown, it is ordered that the time for filing a transcript of the record and docketing said cause in
81 the United States Circuit Court of Appeals for the Seventh Circuit, be and the same is hereby extended to and including the 28th day of April 1932.

Dated this 25th day of March 1932.

LOUIS FITZHENRY, *Judge.*

O.K.

MARKS ALEXANDER,
Asst. U.S. Atty.

[File endorsement omitted.]

In United States District Court

Praecipe for transcript of record

Filed Feb. 8, 1932

To the clerk of said court:

You are hereby requested to make a transcript of the record in the above entitled cause to be filed in the United States Circuit Court of Appeals for the Seventh Circuit pursuant to an appeal allowed therein, and to include in such transcript of the record the following, to wit:

1. Placita and captions.
2. Indictment and return thereof.
3. Demurrer to indictment filed February 6, 1930, and any and all orders relating thereto.
4. Assignment of additional ground of demurrer filed February 19, 1930, and any and all order relating thereto.
5. Demurrer to indictment filed January 11, 1932, and any and all orders relating thereto.

5a. Plea of not guilty.

6. Original bill of exceptions.
7. Motions for directed verdict and orders relating thereto.
8. Verdict.

9. Motion for new trial and order relating thereto.
10. Motion in arrest of judgment and order relating thereto.
82 11. Judgment and sentence.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal.
15. Citation and service.
16. Praecipe for transcript of record.
17. Bond.
18. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit, and to be filed in the office of the clerk of the said United States Circuit Court of Appeals on or before the 27th day of February 1932 unless such time is enlarged as provided by the rules last above mentioned.

Dated February 8th, 1932.

HAROLD J. BANDY,
EDMUND BURKE,
Attorneys for Appellant.

Service of the above praecipe is accepted and acknowledged this 8th day of February 1932.

FRANK K. LEMON,
United States Attorney, Southern Dist. Ill.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

83 [Citation in usual form showing service on Frank K. Lemon filed Jan. 29, 1932, omitted in printing.]

84 [Clerk's Certificate to foregoing transcript omitted in printing.]

85 [Caption omitted.]
[Apearances of counsel omitted in printing.]

86

87 [Order setting cause omitted in printing.]

88 [Minute entry of argument and submission, Oct. 5, 1932, omitted in printing.]

89 In United States Circuit Court of Appeals for the Seventh Circuit

No. 4774. October term and session, 1932

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

HARRY MURDOCK, APPELLANT

vs.

THE UNITED STATES OF AMERICA, APPELLEE

Opinion filed December 7, 1932

Before Alschuler, Evans, and Sparks, circuit judges.

Appellant was tried, convicted, and sentenced for violation of section 1114 (a), Revenue Act of 1926, and section 146 (a), Revenue Act of 1928 (identical provisions), which make it an offense to wilfully fail to supply information sought by the Government under the revenue acts. On appeal from the sentence which followed his conviction, he has assigned as error the court's refusal to direct a verdict in his favor and an instruction given by the court to the jury to the effect that the accused is guilty in the opinion of the court and the refusal to give a requested instruction on the subject of wilfulness.

Evans, circuit judge: The indictment charged appellant with having made income-tax returns for the years 1927 and 1928, in each of which he claimed a deduction of $12,000 for sums paid to individuals whose names, as well as the amounts paid, were not stated; that he was thereupon duly brought before the internal revenue agent at Springfield, Illinois, to give the names and addresses of the recipients of such payments; that although he had full knowledge concerning such matters, he wilfully and unlawfully failed to give such

90 testimony or supply such information. To the charge thus preferred, appellant interposed a special plea averring that, if he answered the questions put to him, he would thereby be unlawfully compelled to furnish incriminating testimony against himself. To this plea the United States demurred. The court overruled the demurrer and entered judgment discharging appellant. From this judgment, the Government appealed to the United States Supreme Court, where the judgment thus entered was reversed. *United States* v. *Murdock*, 284 U.S. 141. The facts, as well as the nature of the controversy, are all stated in that opinion and will not be repeated here. The cause was thereafter tried before a jury, and appellant was convicted. The evidence on this trial supported the allegations of the indictment. Avoidance of the sentence thereafter pronounced is first sought on the ground that the statute, which made the wilful failure to give the testimony sought a criminal offense,

is unconstitutional. The basis of this attack is that the section defining the offense contains no exception which relieves the taxpayer from giving self-incriminating testimony.

Appellant cites no case in support of his argument that this statute is unconstitutional, because his rights under the fifth amendment are not therein protected, and our search of the authorities has been no more productive of results in his favor. That the Government may, in view of the sixteenth amendment, lawfully enact legislation to effectively enforce the assessment and collection of income taxes cannot be doubted. *United States* v. *Murdock*, *supra*. Embraced within such powers are the sections which call for reports and information to be supplied by the taxpayer, in answer to questions propounded by the representative of the Government. The information sought in the instant case was relevant. *United States* v. *Murdock*, *supra*. Courts may not presume that the same authority which is responsible for both the sixteenth and the fifth amendments contemplated that one should nullify the other, but rather intended that each should be read and construed in the light of the other. In other words, legislation enacted pursuant to the sixteenth amendment must be construed in the light of the fifth amendment. *Kentucky Railroad Tax Case*, 115 U.S. 32. In fact, a citizen from whom information is sought under a statute enacted pursuant to authority granted to Congress by the sixteenth amendment may invoke or waive the protection provided by the fifth amendment. And likewise the courts will compel the
91 production of information, subject, however, to the right of said taxpayer to justify his refusal so to do by showing facts that bring him within the protection of the fifth amendment. Thus construed, the statute under consideration is not unconstitutional.

Appellant complains because the court charged the jury:

"So far as the facts are concerned in this case, Gentlemen of the Jury, I want to instruct you that whatever the court may say as to the facts, is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

In Federal courts the trial judge may comment on the evidence and, if he makes it clear that his opinion is not binding on the jury, express his opinion on all questions in issue, including the guilt or innocence of the accused. Horning v. District of Columbia, 254 U.S. 135; Palno v. U.S., 58 F. (2d) 111; Buchanan v. U.S., 15 F. (2d) 496.

While it is within the power of the court to express an opinion as to the guilt of the accused, we doubt the wisdom of so doing, save in extraordinary cases. It is true the trial court has an important duty to perform in assisting the jury to arrive at a true verdict. There is, however, in practical operation, we fear, considerable danger of the court's substituting its opinion for that of the jury by such an expres-

sion of opinion. It would seem the better practice to comment upon the character of the evidence and, if and when an opinion is expressed, to limit it to a basic fact or an issue involved, upon which the guilt of accused is in part dependent. By so doing, the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time, the court fully meets its very important duty of assisting the jury in reaching an intelligent verdict.

The significance of this suggestion is better appreciated when we consider the next assignment of error, the court's failure to give a proposed instruction, which reads as follows:

"If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based
92 upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."

It is appellant's contention that the jury should have been enlightened on the subject of wilfulness as an element in the crime charged against him, and that it should have been instructed to consider the accused's explanation in determining whether his failure to give information was wilful. The request was a fair one in view of the testimony and the failure of the court in any other part of the charge to speak of this phase of the case.

There was evidence tending to show that appellant's refusal to testify was because of his belief that it would be self-incriminating. The colloquy or argument which occurred between opposing counsel before he made this statement informed him that his right so to do was at least debatable. The precise question, which was one of law, was whether the protection of the fifth amendment extended to self-incrimination against the operation of a State criminal statute. In the then late case of Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 113, the Supreme Court expressly avoided a ruling on that question. Not until this case reached the Supreme Court was it settled "that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

The accused, when he refused to testify, had just heard his counsel assert that his protection under the fifth amendment extended to self-incriminating statements, even though the incrimination arose out of a State criminal statute. He therefore was within his rights in asking that the jury be charged as requested. True, the jury was not obliged to accept as true, his explanation of his refusal to testify; for advice of counsel on such a question is not an absolute defense. A license to practice law does not carry with it the power to grant immunity to one not entitled to it. On the other hand, the issue of wilfulness is ordinarily one of fact. Wilfulness has been defined to mean something more than knowingly. (Felton v. U.S., 96 U.S. 703; Spurr v. U.S., 174 U.S. 734.)

The good faith belief in advice given by a reputable counsel may, and ordinarily will, have a bearing upon the wilfulness of the conduct of a party who follows it. Without advice of counsel
93 even, a witness may claim the protection of the fifth amendment. Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised. At least in criminal cases, where wilfulness of the accused's conduct is the fact issue, determinative of guilt, and the court has expressed its opinion that the accused is guilty, the accused is entitled to an instruction which directs the jury's attention to his evidence on that issue.

The judgment is reversed, and the cause remanded for a new trial.

94 In United States Circuit Court of Appeals

4774

HARRY MURDOCK

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

Judgment

Dec. 7, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court for a new trial.

94a In United States Circuit Court of Appeals

[Title omitted.]

Order extending time

Dec. 23, 1932

On application of Mr. Marks Alexander, counsel for appellee, it is now here ordered that the time for filing the petition for rehearing in this cause be, and the same is hereby extended 10 days.

Note re petition for rehearing

And afterwards, to wit: On the sixth day of January 1933 there was filed in the office of the clerk of this court a petition for rehearing, which said petition for rehearing is not copied here.

Note re answer to petition for rehearing

And afterwards, to wit: On the thirtieth day of January 1933, there was filed in the office of the clerk of this court an answer to the petition for rehearing, which said answer is not copied here.

95 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

Feb. 22, 1933

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

96 [Clerk's certificate to foregoing transcript omitted in printing.]

97 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is advanced and assigned for argument on Monday, November 6th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

97a (Endorsement on cover:) File no. 37,690. U.S. Circuit Court of Appeals, Seventh Circuit. Term no. 88. The United States of America, petitioner, vs. Harry Murdock. Petition for a writ of certiorari and exhibit thereto. Filed May 22, 1933. File no. 88, O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.——

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered December 7, 1932 (R. 90), reversing a conviction under Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928.

OPINIONS BELOW

The opinion of the District Court sustaining a special plea in bar is reported at 51 F. (2d) 389. That decision was reversed by this Court, 284 U.S. 141. The charge of the District Court at the trial appears at R. 64–67. The opinion of the Circuit Court of Appeals (R. 87–90) is reported in 62 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 7, 1932 (R. 90). A petition for rehearing was denied February 22, 1933 (R. 91). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146(a) of the Revenue Act of 1928 for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix, *infra,* pp. 8–10.

STATEMENT

The respondent was summoned pursuant to the provisions of Section 1104 of the Revenue Act of 1926 as amended by Section 618 of the Revenue Act of 1928[1] (*infra,* p. 10), and, upon being sworn,

[1] Section 618 of the Revenue Act of 1928 authorizes the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of

refused to answer certain questions propounded to him. He was indicted under Section 1114 (a) of the Revenue Act of 1926, and Section 146 (a) of the Revenue Act of 1928 (*infra*, pp. 9–10) for willfully failing to give testimony and supply information (R. 2–7). He filed a special plea to the indictment alleging that his refusal was based upon fear that his answers might incriminate him under State laws, and the District Court sustained the plea. *United States* v. *Murdock*, 51 F. (2d) 389. A direct appeal was taken to this Court, where the decision of the District Court was reversed. *United States* v. *Murdock*, 284 U.S. 141.

The case was thereupon tried in the District Court (R. 12–13). During the trial the respondent requested the court to instruct the jury (R. 67):

> * * * to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that they should consider that in determining whether or not his refusal to answer the questions was willful.

The Court refused this request (R. 67), having theretofore instructed the jury as follows (R. 66):

> You will observe that the offense charged here is the willful failure or refusal to fur-

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making a return where none has been made, to "require the attendance of the person rendering the return" and to "take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

nish information. That means, Gentlemen of the Jury, that having an opportunity to do so he deliberately designed not to furnish the information.

In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the Revenue Agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the state law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the state law. You are instructed, Gentlemen of the Jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent.

Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

The respondent was found guilty (R. 12–13, 68) and was sentenced to a year in jail and fined $5,000 (R. 14). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where the judgment of the District Court was reversed on

the ground that the requested instruction should have been given (R. 90).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that it was reversible error for the District Court to refuse to instruct the jury that they should consider the respondent's good faith and actual belief in determining whether or not his refusal to answer the questions propounded to him was willful.

REASONS FOR GRANTING THE WRIT.

1. The principle of the decision of the court below is in direct conflict with the decision of this Court in *Sinclair* v. *United States,* 279 U.S. 263, and with the decision of the Court of Appeals of the District of Columbia in *Chapman* v. *United States,* 8 App. D.C. 302, 317.

In *Sinclair v. United States, supra,* this Court held that an intentional refusal to answer questions propounded by a committee of the Senate was punishable, even though the refusal was in good faith. It said (p. 299):

> The gist of the offense is refusal to answer the pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. * * * He was bound rightly to construe the statute. His mistaken view of the law is no defense.

The question presented in *Chapman* v. *United States,* 8 App. D.C. 302, *supra,* was similar. The court said (p. 317):

> The refusal to answer necessarily implies wilfullness in the legal sense, and the question of bad faith or evil intent has no place whatever in the case. * * * He must be held to have intended the result which followed his refusal, which was the defeat of the pending investigation, which failed for the want of such testimony as was sought from him; and so far as that investigation was concerned, it was plainly a matter of no consequence that he may have believed himself to have been justified.

The trial court instructed the jury that the word "willful" means that "having an opportunity to do so he deliberately designed not to furnish the information" (R. 66). This instruction, we believe, accurately defined the meaning of the word as it is used in the statutes in question. The implication contained in the instruction requested by the respondent was that a witness may refuse to answer with impunity if he believes in good faith that he is not required to answer. The decisions already cited show that this was not a correct statement of the law.

2. The question whether a witness, acting in good faith and under an actual but erroneous belief that he is not required to answer questions propounded to him, may refuse to answer such ques-

tions with impunity is of general importance. If recusant witnesses may rely upon their own judgment or the advice of counsel and refuse to answer questions propounded to them at an inquiry under Sections 1104 of the Revenue Act of 1926 and 618 of the Revenue Act of 1928 with impunity, it is manifest that the purpose of these and similar statutes will be largely defeated, and such witnesses will be afforded a ready and convenient means of subverting the unquestioned power of Congress to compel testimony in the enforcement of the internal revenue laws.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 50, 113, 116:

> SEC. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.
>
> * * * * * *
>
> When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.
>
> * * * * * *

(U.S.C.App., Title 26, Sec. 1023.)

SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons. (U.S.C.App., Title 26, Sec. 1247.)

SEC. 1114. (a) Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

(U.S.C., Title 26, Sec. 1265.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 836, 878:

SEC. 148. [This section is identical with Section 256 of the 1926 Act above quoted.]

SEC. 618. EXAMINATION OF BOOKS AND WITNESSES.

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

SEC. 146. (a) [This section is identical with Section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.]

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 88

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Illinois sustaining a special plea in bar is reported at 51 F. (2d) 389. That decision was reversed by this Court, 284 U.S. 141. The charge of the District Court at the trial appears at R. 47–50. The opinion of the Circuit Court of Appeals (R. 60–63) is reported in 62 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 7, 1932 (R. 63). A petition for rehearing was denied February 22, 1933 (R. 64).

Petition for a writ of certiorari was filed May 22, 1933, and granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146 (a) of the Revenue Act of 1928 for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

The respondent was summoned pursuant to the provisions of Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928,[1] *infra,* pp. 12–13, and, upon being sworn,

[1] Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, authorizes the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, to "require the attendance of the person rendering the return" and to "take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

refused to answer certain questions propounded to him (R. 31–33). He was indicted under Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928, *infra*, pp. 12–13, for willfully failing to give testimony and supply information (R. 1–5). He filed a special plea to the indictment alleging that his refusal was based upon fear that his answers might incriminate him under State laws, and the District Court sustained the plea. *United States* v. *Murdock,* 51 F. (2d) 389. A direct appeal was taken to this Court, where the decision of the District Court was reversed. *United States* v. *Murdock,* 284 U.S. 141.

The case was thereupon tried in the United States District Court for the Southern District of Illinois (R. 8–10). During the trial the respondent requested the court to instruct the jury (R. 49):

> * * * to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that they should consider that in determining whether or not his refusal to answer the questions was wilful.

The court refused this request (R. 49), having theretofore instructed the jury as follows (R. 48):

> You will observe that the offense charged here is the willful failure or refusal to furnish information. That means, Gentlemen of the Jury, that having an opportunity to do so he deliberately designed not to furnish the information.

> In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the Revenue Agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the state law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the state law. You are instructed, Gentlemen of the Jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent.
>
> Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

The respondent was found guilty (R. 9, 50) and was sentenced to a year in jail and fined $5,000 (R. 10). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where, in reversing the judgment of the District Court on the ground that the requested instructions should have been given, the court said (R. 63):

> The good-faith belief in advice given by a reputable counsel may, and ordinarily will,

> have a bearing upon the willfulness of the conduct of a party who follows it. * * *. Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised. * * *.

Petitioner brings the question thus presented to this Court for review.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that it was reversible error for the District Court to refuse to instruct the jury that they should consider the respondent's good faith and actual belief in determining whether or not his refusal to answer the questions propounded to him was willful.

ARGUMENT

Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928 (*infra*, pp. 12–13), under which respondent was indicted and convicted, make it a crime for any person required to "supply any information, for the purposes of the computation, assessment, or collection of any tax" to "willfully" fail to "supply such information, at the time or times required by law or regulations."

The narrow question here presented is whether the phrase "willfully fails to * * * supply such information" as used in those statutes means anything more than an intentional, deliberate refusal, as charged by the District Court (R. 48), or whether bad faith is an essential ingredient of the crime, as held by the Circuit Court of Appeals (R. 63).

A similar question was before this Court in *Sinclair* v. *United States*, 279 U.S. 263. Therein Sinclair was charged with a violation of Section 102 of the Revised Statutes (U.S.C., Title 2, Sec. 192),[2] in that he refused to answer questions propounded to him by a committee of the Senate. Upon conviction and sentence the case was brought to this Court, where it was contended that the trial court erred in excluding evidence that in refusing to answer Sinclair acted in good faith and on the advice of competent counsel. In rejecting such contention this Court said (p. 299):

> 6. There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102

[2] Section 102 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully* makes default, or who, having appeared, *refuses to answer any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor * * *. (Italics ours.)

> made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. * * *

Similarly, in *Chapman* v. *United States,* 8 App.D.C. 302, Chapman refused to answer questions put to him by a committee of the United States Senate. He was indicted, tried, and convicted, and upon appeal to the Court of Appeals of the District of Columbia contended that (p. 316) "in order to sustain a valid conviction * * * it was necessary that it should appear that his refusal to answer the questions put to him was in bad faith and with evil intent." In rejecting this contention the court said (p. 317):

> The refusal to answer necessarily implies willfulness in the legal sense, and the question of bad faith or evil intent has no place whatever in the case. * * *. He must be held to have intended the result which followed his refusal, which was the defeat of the pending investigation, which failed for the want of such testimony as was sought from him; and so far as that investigation was concerned, it was plainly a matter of no consequence that he may have believed himself to have been justified.

Such was the position taken by the District Court herein when it instructed the jury that willful failure to supply the required information means "that having an opportunity to do so he deliberately designed not to furnish the information" (R. 48). And again (R. 48):

> Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse, and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

Thus the District Court did nothing more than apply the well-established rule that where a statute makes a willful act, or the willful refusal to do an act, a crime, it is only necessary to show that the defendant ran counter to the statutory mandate and that in so doing he acted deliberately and willfully. See *Armour Packing Co.* v. *United States,* 209 U.S. 56, 85–86; *Reynolds* v. *United States,* 98 U.S. 145, 166–167.

The statutes here under consideration do not make bad faith an element of the crime (see *United States* v. *Murdock,* 284 U.S. 141, 148), and the Circuit Court of Appeals was without power to add to the statute (*Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20, 49).[3] Nor can the decision of the court below be sustained upon the ground that "The good-faith belief in advice given by a reputable counsel" (R. 63) had a bearing upon the re-

[3] Therein this Court said (p. 49):

> The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.

spondent's willfulness. Undoubtedly the fact that he consulted counsel before acting had a bearing upon his willfulness. However, instead of tending to establish that his action was not willful, it shows conclusively that he did act willfully after premeditation and deliberation. As stated by the court in *Chapman* v. *United States, supra,* p. 317:

> His refusal to testify was a deliberate and wilful act, all the more deliberate and wilful because he took counsel upon the subject and took time to consider the consequences; * * *.

Willful and deliberate refusal to answer questions pursuant to the mandate of a statute is not unlike willful and deliberate refusal to answer questions propounded in court regardless of the ruling of the court upon the question of immunity. In such a situation a party may not substitute his judgment for that of the court (*Mason* v. *United States,* 244 U.S. 362, 365–367; *Brown* v. *United States,* 276 U.S. 134, 145; *Merchants' Warehouse Co.* v. *Reber,* 269 Fed. 974, 975 (C.C.A. 3d)); nor may he rely upon the advice of counsel in defiance of a court order (*National Corporation* v. *Bartram Hotel Co.,* 263 Fed. 250, 251 (E.D.Pa.), affirmed, 269 Fed. 974 (C.C.A. 3d); *Royal Trust Co.* v. *Washburn, B. & I. Ry. Co.,* 113 Fed. 531, 538–539 (C.C., W.D.Wis.); *In re La Varre,* 48 F. (2d) 216, 222 (S.D.Ga.)). For, as stated by this Court in *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 450:

> If a party can make himself a judge of the validity of orders which have been is-

sued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

Similarly, if a party may make himself the judge of whether he shall obey the mandate of a statute and by his own acts of disobedience defeat the purpose of the statute, then must an important power of Congress be set at naught and every citizen made a law unto himself. Cf. *Reynolds* v. *United States,* 98 U.S. 145, 166–167.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals was erroneous and should therefore be reversed.

J. CRAWFORD BIGGS,
Solicitor General.
SEWALL KEY,
JOHN H. MCEVERS,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

REVENUE ACT OF 1926, C. 27. 44 STAT. 9, 50, 113, 116

SEC. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

* * * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

* * * * *

(U.S.C.App., Title 26, Sec. 1023.)

SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (U.S.C.App., Title 26, Sec. 1247).

SEC. 1114. (a) Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

(U.S.C.App., Title 26, Sec. 1265.)

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 836, 878

SEC. 148. [This section is identical with Section 256 of the 1926 Act above quoted.]

SEC. 618. EXAMINATION OF BOOKS AND WITNESSES:

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

SEC. 146 (a). [This section is identical with Section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.]

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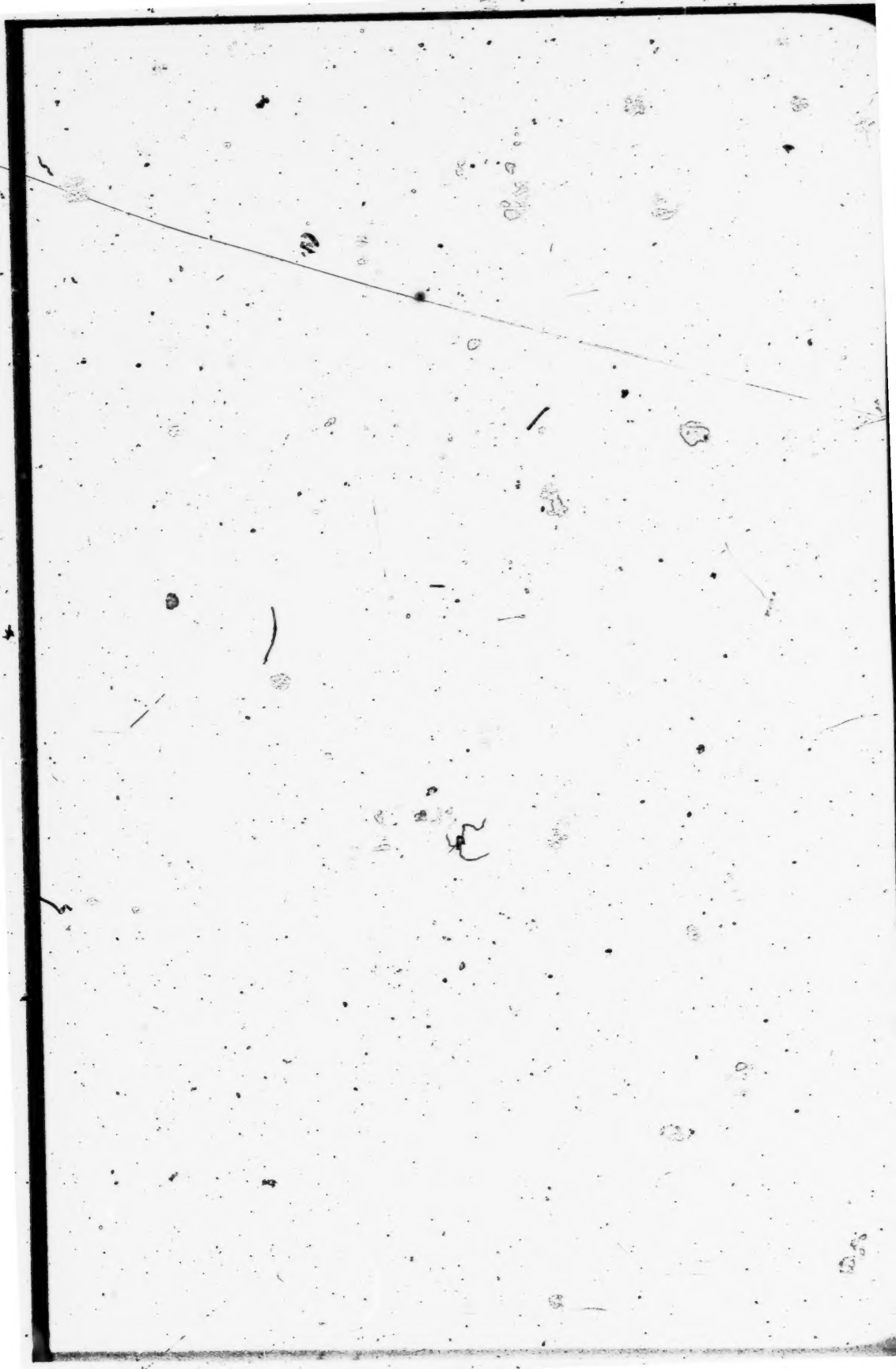

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 88

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

In support of his contention that the word "willfully" in Section 1114 (a) of the Revenue Act of 1926, and Section 146 (a) of the Revenue Act of 1928, shows that Congress intended to punish only those persons who deliberately, intentionally and with bad motive fail or refuse to give information to an Internal Revenue Agent, respondent cites and relies upon *Potter* v. *United States*, 155 U.S. 438 (Br. 21–22), and contends that this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, does not apply. (Br. 27–28.)

The *Potter* case arose under Section 5208 of the Revised Statutes and Section 13 of the Act of July 12, 1882, c. 290, 22 Stat. 162, 166. Those statutes when read together make it a crime for an officer of a national bank to "willfully" certify any check drawn upon the bank, unless the person or company drawing the check has on deposit with the bank at the time such check is certified an amount of money equal to the amount specified in such check. The indictment charged (pp. 440–441) that Potter did "unlawfully, knowingly, and wilfully certify a certain check, which said check was then and there drawn upon said association" for a specified amount by certain named persons who "did not then and there, * * * have on deposit with said association an amount of money then and there equal to the amount then and there specified in said check." Thus, under the statute and the indictment it was essential that the Government not only prove the certification of the check and that there was no money on deposit to meet it, but that Potter knew that the amount on deposit was insufficient. On the trial the books of the bank were introduced in evidence showing that at the time the check was drawn and certified the account was overdrawn. This evidence doubtless authorized an inference of knowledge on the part of Potter. However, to rebut that inference he offered to prove an oral agreement to the effect that overdrafts issued by the parties involved would be con-

sidered a loan. This evidence was excluded. With relation to the exclusion, this Court said (p. 447):

> The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and that such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith supposed that this arrangement was the equivalent of a loan by note, and that the indebtedness of Evans & Co. was fully secured by collateral, it seems to us that the jury would have a right to be informed of the fact as bearing upon the question whether he had "wilfully" violated the statute.

The excluded evidence indicated a mistake of fact. It indicated that Potter thought that there was money in the account. It is well established that one who acts under a mistake of fact acts neither wilfully nor knowingly. See *Felton* v. *United States,* 96 U.S. 699, 702–703; *Spurr* v. *United States,* 174 U.S. 728, 733. However, there is no suggestion that Murdock acted under a mistake of fact. His mistake, if any, was one of law, and it is well settled that a mistake of law constitutes no defense. *Sinclair* v. *United States,* 279 U.S. 263, 299; *Agnew* v. *United States,* 165 U.S. 36, 53; *Armour Packing Co.* v. *United States,* 209 U.S. 56, 86; *Chicago, St. P., M. & O. Ry Co.* v.

United States, 162 Fed. 835, 842 (C.C.A. 8th), certiorari denied, 212 U.S. 579; *Chadwick* v. *United States,* 141 Fed. 225, 243 (C.C.A. 6th).

In *Agnew* v. *United States, supra,* Agnew was indicted under Section 5209 R.S. for having *misapplied* the moneys of a national bank (pp. 38–39). Section 5209 provides that:

> Every president, director, cashier, teller, clerk or agent of any association, who * * * *wilfully* misapplies any of the moneys * * * of the association * * *. (Italics ours.)

shall be guilty of a misdemeanor. Upon the trial the court instructed the jury that (p. 53):

> *The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent.* The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. *It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action.* If, however, the funds, moneys or credits of the First National Bank of Ocala are shown to have been either embezzled or wilfully misapplied by the accused and converted to his own use, whereby, as

> a necessary, natural or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed. (Italics ours.)

This Court held (p. 53) that the instruction "was unexceptionable as matter of law."

In *Armour Packing Co.* v. *United States, supra,* the petitioner was convicted for violation of the Act of February 19, 1903, c. 708, 32 Stat. 847 (commonly called the Elkins Act), in obtaining unlawful concessions from the Chicago, Burlington and Quincy Railway Company. In this Court it contended (p. 85):

> that there is nothing in the facts found in this case to show any intentional violation of the law; that on the contrary the petitioner believed itself to be within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the Interstate Commerce Act did not and could not interfere with it, and that the statute had no application to a shipment of goods for exportation in the manner shown in this case.

With respect to such contention, this Court said (p. 85):

> While intent is in a certain sense essential to the commission of a crime, and in some

> classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, *where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong.* * * * (P. 86.) *The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required.* * * * *A mistake of law as to the right to ship under the contract after the change of rate is unavailing upon well-settled principles. Reynolds* v. *United States*, 98 U.S. 145. (Italics ours.)

A similar position was taken by the Circuit Court of Appeals for the Eighth Circuit in *Chicago, St. P., M. & O. Ry. Co.* v. *United States, supra*, where in considering a similar question to that involved in the above case, the court said (p. 842):

> This argument, when made, impressed us strongly. It seemed contrary to natural justice and in conflict with the fundamental principle underlying the administration of criminal law as recognized by the Supreme Court in the foregoing cases to punish parties who had reason to believe and did honestly believe that what they did was lawful and right. *This, however, seemed doubtful and dangerous doctrine, and commanded our*

most serious consideration. In most cases the evil mind or bad intent accompanies the doing of a wrongful act, and no difficulty arises in the disposition of a case involving an offense malum in se. *It is only when an offense malum prohibitum is charged that the application of the general doctrine becomes doubtful. To hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous criterion. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them. In view of considerations like these the general doctrine alluded to has been modified in its application to statutory offenses.* (Italics ours.)

In *Chadwick* v. *United States, supra,* upon a trial for conspiring with the officers of a bank to certify checks without adequate funds being in the bank, the defendant requested the court to instruct the jury that (p. 242):

> The defendant was not bound to know the rules of the bank or the law governing the officers of the bank with reference to certifying checks, and in the absence of such knowledge she could not be held to have conspired with the officers of the bank, if what she did was done in good faith, and without any criminal intention to do the unlawful act complained of.

In rejecting such request, the trial court in part said (p. 243):

> The only question for you to pass upon is whether the defendant violated the law; *not whether she had any knowledge that she was violating the law.* (Italics ours.)

The Circuit Court of Appeals in sustaining the charge said (p. 243):

> Knowledge that the act which it was the object of the conspiracy to do would be in violation of the law is imputed and need not be proven.

Respondent cites no case supporting his position that a mistake of law constitutes a defense in a criminal case, and we have found none. We submit that his position is fallacious.

~~Petitioner~~ Respondent attempts to distinguish this Court's decision in *Sinclair* v. *United States*, 279 U.S. 263, from the instant case on two grounds: (1) that the statute under which Sinclair was prosecuted did not make wilfulness an ingredient of the offense (Br. 28), and (2) that Sinclair did not claim immunity under the Constitution, as did respondent, but merely challenged the jurisdiction and power of the committee of the Senate before which he was called. (Br. 27.)

As to the first distinction, while the statute involved in the *Sinclair* case did not expressly use the word "willfully," nevertheless the words "willfully" and "knowingly" will be implied. *Baender* v. *Barnett*, 255 U.S. 224, 226.

As to the second distinction, we submit that no difference in principle is involved. If the committee in the *Sinclair* case was without jurisdiction to require Sinclair to answer, he was justified in refusing just as much as Murdock would have been had he been protected by the Constitution. Both made a mistake as to the law, and, as we have stated above, such mistake constitutes no defense.

II

Respondent
~~Petitioner~~ complains of that part of the court's charge to the jury wherein the court told the jury that it felt that the evidence established the defendant's guilt. (Br. 30.) The excerpt quoted by respondent lends an erroneous picture. The court told the jury (R. 48):

> So far as the facts are concerned in this case, gentlemen of the jury, I want to instruct you that whatever the court may say as to the facts is only the court's view. You are at liberty to entirely disregard it. The court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt. If you don't think so, then you should find him not guilty. That is your privilege. If you do think so, then that is the end of the case and your verdict will be one of not[1] guilty.

[1] The court meant "guilty" instead of "not guilty" and it made correction accordingly. (R. 49.)

It will be observed that when read as a whole the instruction was not improper (*Horning* v. *District of Columbia,* 254 U.S. 135) and the Circuit Court of Appeals so held (R. 61). However, its opinion tends to confuse this issue with that as to whether the jury in determining the question of wilfulness should have taken into consideration the fact that the defendant acted upon the advice of counsel. Obviously, the two questions are not related. Either the court had a right to express an opinion or it did not; and either the fact that the defendant acted upon the advice of counsel had a bearing upon the wilfulness with which he acted, or it did not. There is no justification for intermingling the two issues.

Respectfully submitted.

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NO. 88.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

UNITED STATES OF AMERICA, Petitioner,

vs.

HARRY MURDOCK, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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Respondent was entitled to the requested instruction on the subject of good faith 23

Respondent cannot be charged with ignorance of the law because he based his refusal to answer upon an asserted claim that his answers would incriminate him in a state law 25

Case of Sinclair v. U. S., 279 U. S. 263, relied upon by the prosecution, is not applicable 27

At the trial counsel representing the prosecution admitted that the burden was cast upon the prosecution to prove that respondent's refusal to testify was willful 29

Damage was done to respondent's right to a fair trial and to have the jury properly advised of the law controlling the case, through the refusal of the District Court to give the requested instruction 30

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BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

Respondent was convicted in the District Court of the United States for the Southern District of Illinois of the offense of willfully failing to give testimony and supply information when he appeared before an internal revenue agent and was placed under oath and interrogated. The first count of the indictment charged him with a willful

violation of Section 1114 (A) of the Revenue Act of 1926 (U. S. C. A., Title 26, Section 1256). The second count charged him with a willful violation of Section 146 (A) of the Internal Revenue Act of 1928 (U. S. C. A., Title 26, Section 2146). Section 146 (A) of the 1928 Act is identical with Section 1114 (A) of the 1926 Act excepting that the word "Title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 law. Each of these sections reads as follows:

> "Any person required under this Act (Title) to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment or collection of any tax imposed by this Act (Title), who willfully fails to pay such tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to all penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

The applicable sections of the revenue acts involved in this prosecution are set forth in an appendix which follows this brief.

THE INDICTMENT.

After alleging that throughout the year 1927 respondent was a citizen of the United States, residing within the

Eighth Internal Revenue Collection District of Illinois, and that he made and filed his income tax return for that year with the Collector of Internal Revenue of said district, and that, in said return, he understated his total receipts for said year by the sum of $12,000, and claimed that said sum had been paid by him to a person or persons unknown to the grand jurors, the first count of the indictment alleged that on December 23, 1929, in pursuance of a written designation of Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, giving him authority so to do, John R. Kirk, United States Internal Revenue Agent in charge at Springfield, Illinois, issued a written summons to respondent which was regularly served personally on him on December 27, 1929, requiring him to appear before the said United States Revenue Agent at Springfield, Illinois, on December 30, 1929, to give testimony and supply information for and to said Commissioner concerning said payment of said moneys; that respondent did appear in response to said summons, and that he then and there "did willfully fail to give such testimony and supply such information."

The second count is almost identical with count 1 excepting that it refers to respondent's income-tax return for the year 1928.

THE SENTENCE.

The respondent was found guilty and was sentenced to serve a year in jail and to pay a fine of $5,000 (R. 14).

From this conviction he appealed to the United States Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the judgment and remanded the cause for a retrial.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals in this case is reported in 62 F. (2nd) 926.

SUMMARY OF OPINION OF COURT OF APPEALS.

The District Court charged the jury, in part, as follows: "The Court feels from the evidence that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66). Counsel for respondent excepted to this part of the charge as being an "unfair and an unreasonable usurpation of the province of the jury" (R. 67), and upon the appeal respondent assigned the giving of this part of the charge as error" (R. 75).

Concerning this assignment of error the Court of Appeals said in its opinion: "While it is within the power of the Court to express an opinion as to the guilt of the accused, we doubt the wisdom of so doing, save in extraordinary cases. It is true the trial court has an important duty to perform in assisting the jury to arrive at a true verdict. There is, however, in practical operation, we

fear, considerable danger of the Court's substituting its opinion for that of the jury by such an expression of opinion. It would seem the better practice to comment upon the character of the evidence, and if when an opinion is expressed, to limit it to a basic fact, or an issue involved, upon which the guilt of the accused is, in part, dependent. By so doing the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time the Court fully meets its very important duty of assisting the jury in reaching an intelligent verdict" (62 F. [2nd] 926):

At the conclusion of the charge counsel for respondent requested the Court to give this instruction: "The defendant also suggests and asks the Court to give an instruction to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that you should consider that in determining whether or not his refusal to answer the questions was willful" (R. 67). The Court refused this request. Respondent excepted to the ruling of the Court (R. 67) and assigned it as error upon the appeal (R. 75). Concerning this assignment the Court of Appeals said in its opinion: "The request was a fair one in view of the testimony and the failure of the Court, in any other part of the charge, to speak of this phase of the case." There was evidence tending to show that appellant's refusal to testify was caused by his belief that it would be self-incriminating.

The colloquy or argument which occurred between the opposing counsel before he made this statement informed him that his right so to do was at least debatable. The precise question, which was one of law, was whether the protection of the Fifth Amendment extended to self-incrimination against the operation of a state criminal statute. In the late case of U. S. ex rel. Vaj'tauer v. Commissioner of Immigration, 273 U. S. 103, the Supreme Court expressly avoided a ruling on that question. Not until this case reached the Supreme Court was it settled "that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination."

The accused, when he refused to testify, had just heard his counsel assert that his protection under the Fifth Amendment extended to self-incriminating statements, even though the incrimination arose out of a state criminal statute. He therefore was within his rights in asking that the jury be charged as requested. True, the jury was not obliged to accept as true his explanation of his refusal to testify, for advice of counsel on such a question is not an absolute defense. A license to practice law does not carry with it the power to grant immunity to one not entitled to it. On the other hand, the issue of willfulness is ordinarily one of fact. Willfulness has been defined to mean something more than knowingly (Felton v. U. S., 96 U. S. 703; Spurr v. U. S., 175 U. S. 734).

The good faith, belief in advice given by counsel may, and ordinarily will, have a bearing upon the willfulness of the conduct of a party who followed it. Without advice of counsel even, a witness may claim the protection of the Fifth Amendment. Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised. At least in criminal cases, where willfulness of the accused's conduct is the fact issue, determinative of guilt, and the Court has expressed its opinion that the accused is guilty, the accused is entitled to an instruction which directs the jury's attention to his evidence on that issue" (62 F. [2nd] 926).

THE EVIDENCE.

As heretofore stated, each count of the indictment charged respondent with WILLFUL failure to supply information on a specific occasion when he appeared before the Internal Revenue Agent in response to a summons.

The prosecution offered Internal Revenue Agents A. R. Waterbury (R. 37) and Mathew S. Keyes (R. 41) to prove that respondent met them voluntarily, and not in response to a summons or other legal mandate, at East St. Louis, Illinois, on September 19, 1929, and had a conversation with them concerning his income tax returns for 1927 and 1928 (R. 37 and 38, 41 and 42). It was shown by the testimony of these witnesses that they asked respondent to tell them about the heretofore mentioned deductions shown in respondent's income tax returns for the years 1927 and

1928, and that he refused to give them the information which they requested.

Counsel for respondent objected to this testimony upon the ground that it was "wholly immaterial to the charge in this indictment" (R. 37), and because the defendant was indicted for refusing to give information at a certain specified time and place, to an officer designated by the Commissioner of Internal Revenue, and because he was "prepared to answer that charge but was not prepared to defend the charge of refusal to give information in September, 1929, to an entirely different person than the person named in the indictment, a person not shown to have been designated by the Internal Revenue Commissioner, as stated in the indictment" (R. 38).

The Court overrruled these objections and respondent was allowed an exception (R. 37 and 38).

In reply to the objection then and there offered by counsel for respondent, the District Attorney attempted to justify this testimony in these words: "There is a question of willfulness here and that is why I think it is material" (R. 38).

Following the ruling of the Court upon the objections to the testimony, counsel for respondent then asked the Court to withdraw a juror and continue the case, because of the injection of this testimony "that the defendant considers immaterial, and that he is in nowise apprised of by the indictment, and that he could not in any way anticipate and prepare for," and which "requires the pres-

ence here as a witness for the defendant of this Mr. Kreipke, that this witness mentions" (R. 39).

The Court overruled this motion, but allowed respondent an exception (R. 40).

The prosecution then introduced in evidence a correct transcript of the proceedings before Internal Revenue Agent Kirk, on January 9, 1930, when respondent appeared and testified under oath, in response to a summons that had been duly served upon him. This transcript, which appears in the record beginning at page 49, shows that respondent was represented by a Mr. Moore, an attorney. After respondent was sworn, but before he testified, the record shows that a conversation occurred in the hearing and presence of respondent between Mr. Moore, Internal Revenue Agent Kirk and a Mr. Green, attorney for the Internal Revenue Department. In this conversation Mr. Moore stated that if there was any question about the deductions that had been made by respondent from his income for the years 1927 and 1928, as shown by his sworn returns, respondent was ready to pay the tax upon same. Mr. Moore also stated that respondent was ready to supply information, but that he could not answer some questions that might be asked of him "without tending to incriminate and degrade himself" (R. 52).

The attorney representing the Internal Revenue Department then asked Mr. Moore whether he had in mind a criminal prosecution under state law or under federal law, to which Mr. Moore replied: "I doubt if they have

a right to require me to point out which particular law he might put himself liable, to a state law or a federal law, or whether it might be both" (R. 52).

After asserting that he did not believe the Internal Revenue Agent could lawfully require him to specify whether the fear of incrimination was of a prosecution for violation of a federal law or state law, Mr. Moore said: "I think I would state that we have particularly in mind a state law" (R. 53).

After respondent had answered several questions propounded by the attorney representing the Internal Revenue Agent, he was asked this question: "Has that been your only business?" He replied, "I refuse to answer." He was asked, "On what ground?" He replied, "On the ground that I might give information that might incriminate and degrade myself" (R. 56). In asserting this claim of his constitutional privilege against being required to give self-incriminating testimony, respondent did not limit his claim to fear of prosecution under a state law or a federal law, but he made the claim sufficiently broad and comprehensive to cover both.

The attorney for the Internal Revenue Agent then asked him: "Do you have in mind the violation of a federal law or state law when you state your ground is that you might give information to incriminate or degrade yourself?" He replied: "Against a state law." The attorney then asked: "And not against a federal law?" To this he answered: "Not that I know of" (R. 56).

Respondent refused to answer fourteen of the questions which were asked of him. In each instance he stated that he refused to answer because his answers might incriminate him.

An examination of these questions clearly shows that his fear that his answers might incriminate him was not imagined or frivolous. It is apparent that his refusal to answer was based upon a well-founded fear of self-incrimination. This is evidenced by such questions as the following: "Mr. Murdock, are you at the present time operating any slot machines without the consent of public officials?" (R. 57). "Did you in 1928 operate slot machines without the consent of public officials?" (R. 57).

HISTORY OF THIS LITIGATION.

Respondent was indicted on January 23, 1930 (R. 7). He interposed several sworn written pleas in bar to the indictment. In these pleas he alleged that his failure to answer questions was not a willful failure or refusal, but that it was caused by his belief that his answers would incriminate him. The District Court sustained one of these pleas and entered judgment in favor of defendant and in bar of the prosecution. The opinion of the District Court is reported at 51 Fed. (2nd) 389. The Government appealed to this Court, and the decision of the District Court was reversed. The opinion of this Honorable Court appears at 284 U. S.

Upon the case being redocketed in the District Court respondent was convicted, as hereinbefore stated.

QUESTION PRESENTED.

Counsel for petitioner in their petition for the writ of certiorari, state that the question here presented is: "Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146 (A) of the Revenue Act of 1928, for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer (Petitioner's Petition, p. 2).

This is not the precise question presented by this appeal. There are two questions presented and they are:

(1) Did the Circuit Court of Appeals correctly hold that the District Court committed reversible error in instructing the jury as follows: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66).

(2) Did the Circuit Court of Appeals correctly hold that the District Court committed reversible error in refusing to give the following instruction requested by respondent:

"The defendant also suggests and asks the Court to give an instruction to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that you should consider that in determining whether or not his refusal to answer the questions was willful" (R. 67).

BRIEF OF AUTHORITIES.

I.

Willfulness, as used in a criminal statute, means the doing or omitting to do a thing knowingly and willfully. It implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it.

Potter v. U. S., 155 U. S. 438, at 446;
Felton v. U. S., 96 U. S. 699, at 702;
Spurr v. U. S., 174 U. S. 734;
Murdock v. U. S., 62 Fed. (2nd) 926.

II.

Willfulness has frequently been defined as signifying an evil intent without justifiable excuse. It means not merely voluntarily, but with a bad purpose.

1 Bishop, Crim. Law, Sec. 428;
Comm. v. Kneeland, 20 Pick. 220.

III.

Where willfulness is the vital element of the criminal offense charged in the indictment, the accused is entitled to introduce evidence tending to show that his act was done in good faith and under the honest belief that it would not constitute a violation of law. This evidence is

admissible in order to refute the allegation that the defendant's conduct was willful. For the same reason the accused is entitled to an instruction enlightening the jury upon the subject of willfulness and advising the jury that it should consider the good faith or honest belief, if any, of the defendant, in determining whether his conduct was willful.

Potter v. U. S., 155 U. S. 446.

IV.

Whether guilty or innocent, the defendant has the right to a fair and impartial trial. He is entitled to have the jury properly and correctly instructed upon the law. The law does not provide one method for trying innocent persons and another for trying guilty persons.

People v. Garines, 314 Ill. 413;
People v. Gardner, 203 Ill. 204;
People v. Newman, 261 Ill. 11.

V.

The trial court should not instruct the jury that the Court believes the defendant has been proved guilty, by the evidence, beyond any reasonable doubt. The giving of such an instruction in effect substitutes the judgment of the Court for that of the jury, and takes from the jury its lawful function of deciding the facts in the case. It also

takes from the defendant his constitutional right to a trial by jury.

Murdock v. U. S., 62 Fed. (2nd) 926).

VI.

The statute under which Harry Sinclair was prosecuted was not similar to the statute involved in this proceeding. Willfulness was not one of the necessary elements of the offense with which Sinclair was charged. Mere refusal to testify before the Senate Committee constituted the offense. What is said by this Honorable Court in the decision of the Sinclair case is in no way pertinent to the facts of this case.

Sinclair v. U. S., 279 U. S. 263.

SUMMARY OF ARGUMENT.

The burden was cast upon the prosecution at the trial to prove that respondent "willfully" failed to give testimony and supply information. The question of whether respondent's refusal to answer certain questions amounted to a willful violation of the statute was one of the important fact issues in the case.

Omitting to do a thing "willfully" implies not only a knowledge of the thing, but a determination, with a bad intention, to omit doing it.

Because the question of whether respondent's refusal to answer questions constituted a willful violation of the statute was of the essence of the accusation, respondent was entitled to have the jury instructed upon the subject of willfulness and also upon the subject of his good faith in refusing to answer. If respondent refused to answer certain questions because he honestly believed, in good faith, that his answers would incriminate him, the jury should have been instructed to consider that fact in determining whether respondent's conduct constituted a willful violation of law.

The trial court committed reversible error in refusing respondent's request to charge the jury as follows: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in

determining whether or not his refusal to answer the questions was willful."

Although respondent was entitled to the requested instruction on the subject of good faith, the jury was not obliged to accept as true his explanation of his refusal to testify.

Respondent cannot be charged with ignorance of the law because he based his refusal to answer upon an asserted claim that his answers would incriminate him in a state law. At the time he made this claim the question of whether a person testifying in a federal proceeding might claim immunity from supplying information because his answers might incriminate him in a state court had not been definitely decided, and the decisions of this Honorable Court were in conflict. It was not until the decision of this case by this Court, reported in 284 U. S. 141, that it was authoritatively and finally decided that a claim of privilege from answering because of danger of self-incrimination in a state court may not be raised by one testifying in a federal investigation.

The case of Sinclair v. U. S., 279 U. S. 263, relied upon by the prosecution, is not applicable. Willfulness was not an element of the offenses defined by the statute under which Mr. Sinclair was prosecuted. Mere refusal to answer constituted the offense in that case, and it was immaterial whether the refusal was willful or otherwise.

At the trial counsel representing the prosecution admitted that the burden was cast upon the prosecution to prove that respondent's refusal to testify was willful.

The trial court should not have told the jury, in the charge, that: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt." The effect of the giving of this instruction was for the Court to substitute itself for the jury, and to take from the jury the determination of the fact issue of whether respondent's conduct constituted a willful violation of the statute.

ARGUMENT.

The statute under which respondent is prosecuted does not make every failure to supply information a violation of law. It is only when one "willfully" fails to supply such information that he may be punished.

The record of this case shows that respondent refused to answer certain questions that were asked of him because he believed that his answers would incriminate him. It is true that, when pressed to state whether he feared a criminal prosecution under a state or federal law, he specified the state law, but this is immaterial in arriving at a decision as to whether his refusal was willful. Although it is the law, as announced by this Court in this case (284 U. S. 141), that a witness in a federal investigation cannot invoke the protection of the Fifth Amendment to save him from a possible criminal prosecution in a state court, and although it is also true that ignorance of the law is not an available defense to one accused of crime, these facts are in no way determinative of whether the refusal of respondent to answer certain questions was willful or based upon good faith and an honest, but ill-founded belief.

This case does not come within that class of statutory offenses which become offenses by the mere doing of the prohibited act, regardless of whether the violator intends the act or its consequence. The inclusion of the word "wilful" in this penal statute clearly shows that Con-

gress intended to punish only those persons who deliberately, intentionally and with bad motive, fail or refuse to give information to an Internal Revenue Agent. The inclusion of it made willfulness a vital part of the offense and imposed upon the prosecution the burden of proving that respondent's alleged offense was willfully done.

In the case of Potter v. U. S., 155 U. S. 438, the defendant, an official of a national bank, was charged with willfully certifying a check for a depositor who did not have on deposit sufficient money to pay the check. The Court said, in part:

> "The charge is a willful violation. That is the language of the statute. Section 5208, Revised Statutes, makes it unlawful for any officer of a national bank to certify a check unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the Act of 1882 imposes the penalty upon one 'who shall willfully violate,' etc., as well as upon one who shall resort to any device. * * * The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of the fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'willful' in criminal statutes has been

considered by this Court. In Felton v. U. S., 96 U. S. 699, at 702, it was said: 'Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it. The word "willfully," says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose" ' (Com. v. Kneeland, 20 Pick. 220). 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse' (1 Bishop, Crim. Law, Sec. 428). * * * The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith supposed that this arrangement was the equivalent of a loan by note, * * * it seems to us that the jury would have a right to be informed of the fact, as bearing upon whether he had 'willfully' violated the statute. * * * As 'willful' wrong is of the essence of the accusation, testimony bearing directly on the question is of vital importance, and error in rejecting it cannot be regarded as other than as material and manifestly prejudicial."

Because the question of whether respondent's refusal to answer questions constituted WILLFUL failure to supply information was one of the important fact issues in this case, the respondent was entitled to have the jury instructed upon this phase of the case. He was entitled to have the jury instructed that if his refusal to answer

questions, as shown by the evidence, was caused by his honest belief that his answers would incriminate him or subject him to a criminal prosecution, and that he believed this in good faith, that then he was not guilty of willfully failing to supply information as required by the statute and charged in the indictment. But he did not request the Court to charge the jury as strongly as here suggested. He did not request an instruction that in any way would direct a verdict or indicate what the jury's verdict should be. He merely requested the Court to charge the jury that if the jury believed that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon the defendant's actual belief the jury should consider that in determining whether the defendant's refusal to answer questions was willful. A willful wrong having been of the essence of the accusation and of vital importance in deciding upon the guilt or innocence of respondent, the refusal of the District Court to charge the jury as requested in respect to this phase of the prosecution cannot be construed as anything other than material and manifestly prejudicial error.

The decision of the Court of Appeals that the respondent was entitled to this instruction does not impair the vitality of the statute or obstruct its effective administration in any particular. The evidence in this record shows that respondent was represented by counsel at the hearing before the Internal Revenue Agent, and that he acted and

relied upon advice of counsel. It also shows that he refused to answer certain questions because advised to do so by his attorney and also because he actually believed that his answers would incriminate him. The jury, however, was not obliged to accept as true this explanation of his refusal to testify. We do not contend that the jury would have been in any manner bound by respondent's explanation. We merely submit the sensible and logical contention that the jury should have been instructed upon this question in order that it might intelligently pass upon the fact issue of whether respondent's refusal to answer questions was willful. As stated by the Court of Appeals in its opinion in this case:

> "True, the jury was not obliged to accept as true his explanation of his refusal to testify; for advice of counsel on such a question is not an absolute defense. A license to practice law does not carry with it the power to grant immunity to one not entitled to it. On the other hand, the issue of willfulness is ordinarily one of fact. * * * The good faith belief in advice given by counsel may, and ordinarily will, have a bearing upon willfulness of the conduct of a party who followed it. * * * Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised, at least in criminal cases, where willfulness of the accused's conduct is the fact issue, determinative of guilt, and the Court has expressed its opinion that the accused is guilty, the accused its entitled to an instruction which directs the jury's attention to his evidence on that issue" (62 F. [2d] 926).

It will probably be argued by the prosecution that the Fifth Amendment did not protect respondent from divulging facts which might subject him to criminal prosecution in a state court; that his claim of privilege upon this ground was ill-founded and was based upon ignorance of the law. It will probably be further argued that ignorance of the law is no excuse and will not protect the respondent in this case. As already stated, ignorance of the law is no excuse, but honest ignorance of the law, honestly asserted, may, and often will, constitute a fact to be considered in determining whether or not the act committed by the accused constituted a willful violation of the statute. Moreover, at the time respondent appeared before the Internal Revenue Agent and gave testimony, there was a conflict in the decisions of this Honorable Court upon the question of whether the Fifth Amendment protects one from incriminating himself or subjecting himself to criminal prosecution in a state court. The District Court that sustained respondent's special plea in bar at the first trial believed that the Fifth Amendment is sufficiently broad to protect one from giving incriminating evidence that might subject him to prosecution in a state court (51 F. [2nd] 389).

In an opinion by Justice Holmes in the case of Ballman v. Fagin, decided January 2, 1916, and reported at 200 U. S. 186, this Honorable Court said:

> "As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop' and so subject to the criminal law of the state

> in which the grand jury was sitting. According to U. S. v. Saline Bank, 1 Pet. 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law."

In a case decided January 3, 1927, entitled U. S. ex rel. Vaj'tauer v. Commissioner of the Immigration, 273 U. S. 103, at 113, this Court, when confronted with the question of the right of one to avail himself of the Fifth Amendment in order to refuse to give information that might subject him to prosecution in a state court, did not decide the question, but said:

> "This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by Hale v. Henkel, 201 U. S. 43; Brown v. Walker, 161 U. S. 591; Compare U. S. Saline Bank, 1 Pet. 100; Ballman v. Fagin, 200 U. S. 186."

It was not until the opinion of this Honorable Court in this case, when it was heard before, as reported in 284 U. S. 141, that it was finally settled that one is not permitted to claim the protection of the Fifth Amendment as a reason for refusing to give information that might incriminate him in a state court.

We respectfully submit that respondent, a layman, unlearned in the law, could not be charged with ignorance of the law upon a question on which our courts of review had rendered conflicting opinions. He certainly could

not, under the circumstances, be charged with ignorance of law to such an extent that the trial court could hold, as a matter of law, that his conduct, dictated by ignorance of law, amounted to a willful disregard for and violation of the statute under which he was prosecuted.

In the petition for certiorari counsel for the Government contend that this case is controlled by the recent opinion of this Court in Sinclair v. U. S., 279 U. S. 263. The Sinclair case is not in any way applicable to this case. The law stated in the Sinclair opinion offers no assistance for the decision of this case. Sinclair was subpoenaed before a committee of the United States Senate and was asked certain questions concerning oil leases. He refused to answer the questions, but he did not base his refusal upon the contention that his answers might incriminate him. He expressly avowed his intention not to claim any protection under the Constitution. As stated in the Court's opinion: "He disclaimed any purpose to invoke protection against self-incrimination and asserted there was nothing in the transaction which could incriminate him." He boldly, deliberately and intentionally challenged the jurisdiction and the power of the committee, and called attention to the fact that the matter being investigated was one to be investigated in certain litigation then pending in court, and he said: "I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have de-

liberately referred all questions of which you had any jurisdiction and shall respectfully decline to answer any questions propounded by your committee."

His refusal to answer was deliberate and premeditated and constituted a willful and intentional contempt of the Senate committee. He offered no extenuating facts that might be construed as showing that his refusal to answer was made in good faith or under an honest but mistaken understanding of fact.

Moreover, the statute under which he was prosecuted made the mere refusal to testify an offense. The mere doing of it constituted the crime. Congress did not make willfulness an ingredient of that offense. The statute under which he was prosecuted (U. S. C. A., Title 28, Sec. 102) says:

> "Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, * * * who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor," etc.

Because the statute under which Sinclair was prosecuted did not include the word "willfully," the Sinclair case is not pertinent and it sheds no light upon the question here presented.

Counsel for the prosecution have reversed the position they adopted at the trial in their present contention that a complete case was made against respondent by showing that he refused to answer questions, and in their further contention, now made for the first time, that the Government was not required to prove that defendant's conduct was willful and that the defendant, therefore, was not entitled to an instruction on the defense of good faith or honest belief. At the trial the prosecution offered two witness, Waterbury and Keyes (R. 37 and 41), by whom they proceeded to show that these witnesses held a meeting with respondent at East St. Louis, Illinois, several months prior to the date on which the respondent was summoned to appear before Internal Revenue Agent Kirk, and that in that meeting respondent refused to answer certain questions concerning his income for the years 1927 and 1928. Respondent was under no legal duty to answer the questions propounded to him by agents Waterbury and Keyes at the meeting at East St. Louis. He was not charged in the indictment with having refused to answer questions asked by these gentlemen. He was only charged with refusal to answer the questions propounded by Internal Revenue Agent Kirk on January 9, 1930. For this reason, counsel for respondent objected to this testimony, but the objection was overruled (R. 37-38). When the objection was interposed, the District Attorney representing the Government at the trial said: "There is a question of willfulness here, and that is why I think it is material" (R.

38). Here is an admission of the prosecution, made at the trial, that proof of willfulness was a necessary burden cast upon the prosecution by this statute. Here was an admission that states that whether respondent's conduct amounted to a willful failure to supply information constituted one of the vital fact issues in the case. If this was a vital fact issue in the case, respondent was entitled to an instruction upon this question advising the jury that if they believed from the evidence that respondent's refusal to answer was made in good faith and was based upon his honest belief, the jury should consider that in determining whether his refusal to answer the questions was willful, and the refusal of the District Court to thus instruct the jury as requested by respondent constituted reversible error.

The damage that was done to respondent's right to a fair trial and to have the jury properly advised of the law controlling the case, through the refusal of the District Court to give the requested instruction, is emphasized by the following part of the Court's charge: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66).

This instruction advised the jury that the defendant had been proved guilty of a willful violation of the statute beyond any reasonable doubt. It completely and forever

swept away any defense that respondent may have had. It dispensed with the necessity of a jury trial.

The Court, in giving this instruction, substituted its opinion for that of the jury's and deprived the respondent of his constitutional right to a trial by jury. This instruction settled the issue of willfulness against respondent, and withdrew from the jury its right to consider this important question.

This instruction was not a comment upon the facts, made in order to assist the jury in construing or interpreting the evidence. It was a mandatory instruction upon the ultimate fact to be determined by the jury.

When this instruction is considered in conjunction with the refusal of the Court to give the instruction requested by respondent on the question of good faith, we respectfully submit that no other conclusion can be reached than that respondent was deprived of a fair trial. Whether respondent is guilty or innocent of the charge appearing in this indictment is a question to be decided by a jury after it has been correctly advised by the Court of the applicable law. Whether respondent is guilty or innocent in this case, he was entitled to a fair trial in accordance with the law of the land. As stated by the Supreme Court of Illinois in the case of People v. Garines, 314 Ill. 413:

> "Although there may be enough evidence in a record to justify a conviction, the defendant has a right to a trial by jury and not by this Court. He has a

right to be tried in accordance with the law of the land, and a conviction secured in total disregard of that law cannot be sustained. The law does not provide one method for trying innocent persons and another for trying guilty persons."

For the reasons herein presented, we respectfully submit that the decision of the United States Circuit Court of Appeals for the Seventh Circuit reversing the judgment of the District Court and remanding this cause for another trial is correct, and should be affirmed.

Respectfully submitted,

EDMUND BURKE,
Springfield, Illinois,
HAROLD J. BANDY,
Granite City, Illinois,
Attorneys for Respondent.

APPENDIX.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution provides:

No person * * * shall be compelled, in any criminal case, to be a witness against himself. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9, 50, 113, 116:

Sec. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits and income, * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits and income, and the name and address of the recipient of such payment.

* * * * * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income. * * *

(U. S. C. App., Title 26, Sec. 1023.)

Sec. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose

of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return, or of any officer or employe of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (U. S. C. App., Title 26, Sec. 1247).

Sec. 1114. (a) Any person required under this act to pay any tax, or required by law or regulation made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * * * *

(U. S. C., Title 26, Sec. 1265.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 836, 878:

Sec. 148. (This section is identical with Section 256 of the 1926 Act, above quoted.)

Sec. 618. EXAMINATION OF BOOKS AND WITNESSES.

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employe of the Bureau of Internal Revenue, including the field service, designated by him for the purpose, to examine any books, papers, records or memoranda bearing upon the matters, and may require the attendance of the person rendering the return, or of any officer or employe of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Sec. 146. (a) (This section is identical with section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "act" in the two instances in which the latter word is used in the 1926 Act.)

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NO. 88.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

UNITED STATES OF AMERICA, Petitioner,

vs.

HARRY MURDOCK, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

PETITION FOR LEAVE TO FILE.

Now comes Harry Murdock, above-named respondent, by his attorneys, and respectfully petitions this Honorable Court for permission to file the following supplemental brief instanter.

This case is set for oral argument before this Honorable Court on November 6, 1933. Rule 27 of the revised rules of this court provides that the brief for appellant or petitioner shall be filed with the clerk at least three weeks before the case is called for hearing, and that counsel for

appellee or respondent shall file a brief at least one week before the case is called for hearing. This rule required petitioner's brief to be filed not later than October 16th. No brief was filed by petitioner on or before that date, but on October 23rd the undersigned counsel, representing respondent, received, from the Solicitor General of the United States, a proof of a brief with a letter accompanying same, signed by the Solicitor General, in which he said that "final print is expected in a day or two and copies will then be sent to you." The letter of the Solicitor General bears date of October 20, 1933.

When no brief for petitioner was filed by October 16th the undersigned counsel for respondent prepared a brief for respondent and on October 21, 1933, mailed forty printed copies of same to the clerk of this Honorable Court, and two printed copies to the Solicitor General.

Counsel representing respondent deem it necessary to reply to certain statements contained in the brief of the petitioner, and the attached supplemental brief is limited to that single purpose.

It is for this reason that permission is respectfully asked to file this supplemental brief for respondent.

Respectfully submitted,

EDMUND BURKE,
Springfield, Illinois,
HAROLD J. BANDY,
Granite City, Illinois,
Attorneys for Respondent.

ARGUMENT.

Counsel for petitioner say, on page 6 of their brief, that:

> "The narrow question here presented is whether the phrase, 'willfully fails to * * * supply such information,' as used in those statutes, means anything more than an intentional, deliberate refusal, as charged by the District Court (R. 66), or whether bad faith is an essential ingredient of the crime, as held by the Circuit Court of Appeals (R. 90)."

Petitioner's statement of the question presented is inaccurate and misleading. The question presented is whether respondent was entitled to have the jury instructed to consider his asserted "good faith" and "actual belief" in refusing to answer certain questions, in determining whether "his refusal to answer the questions was willful."

The record shows that respondent did not deliberately refuse to answer any question. His refusal was not a summary one that exhibited contempt for the law. Each time that he refused to answer he stated that his answer might incriminate him. The record shows that he believed that the Fifth Amendment excused him from divulging information that might incriminate him in a state court.

The statute makes it an offense for a taxpayer, when summoned before an internal revenue agent and placed under oath, to willfully fail to supply information. Both counts of the indictment charge a WILLFUL failure by respondent to supply requested information.

The term "willfulness" has been defined in many reported cases and many textbooks. In 16 C. J. 79-80 it is said:

> "The term 'willfulness' is vague in its meaning. * * * Generally, when employed in a penal statute, it indicates a bad or corrupt purpose, an evil intent without reasonable grounds to believe that the action is lawful."
>
> "An allegation that a thing is done willfully is equivalent to alleging that it is done knowingly. So it has been held in a number of cases that where one bona fide believes that his act is right, it is not willful."

Am. & Eng. Enc. of Law, V. 30, pp. 528-529.

In the case of Spurr v. U. S., 174 U. S. 728, the defendant was charged with willfully certifying a check of a national bank in which he was employed at a time when the deposit of the person for whom the check was certified was insufficient to pay the check. In this case the Court said:

> "The wrongful intent is the essence of the offense. The defense was that defendant had no actual knowledge that Dobbins and Dazey had not sufficient funds in the bank to meet the check; that, on the contrary, he believed that they had such funds. * * * That he honestly relied on that information and that he had the right to do so. Defendant was entitled to the full benefit of this defense, and in order to secure that, it was vital that the meaning of 'willful violation,' as used in Section 13 of the Act of 1882, should be clearly explained to the jury."

In the Spurr case, as in the present case, counsel representing the defendant requested the Court to instruct the jury upon the meaning of the inclusion of the word "willful" in the statute. This the trial court refused to do. This Honorable Court, in reversing the judgment, said:

> "We think the learned Circuit Judge clearly erred in declining the request of counsel in respect of section 13."

In Potter v. U. S., 155 U. S. 437, in defining "willfulness" in a penal statute, it is said that it implies, on the part of the person charged, "knowledge and purpose to do wrong."

In Felton v. U. S., 96 U. S. 699, at 702, it is said:

> "Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it."

In Potter v. U. S., supra, it was also said:

> "As willful wrong is of the essence of the accusation, testimony bearing directly on the question is of vital importance, and error in rejecting it cannot be regarded as other than as material and manifestly prejudicial."

We respectfully submit that if testimony upon a certain phase of a case is so vitally material that rejection of it constitutes "material and manifestly prejudicial" error,

the jury should be instructed upon the law applicable to that evidence.

Respondent's sworn testimony explaining his reasons and purposes for refusing to answer was introduced into the evidence by the prosecution at the trial of this case. Not only did the United States Attorney introduce this evidence, but he did not object to it or move that it be stricken from the record. It is a part of the testimony in this case. It relates directly to the question of whether respondent's refusal was willful. Inasmuch as it was proper and pertinent testimony, respondent was entitled to an instruction upon this phase of the case. In requesting such an instruction respondent did not ask the Court to single out or emphasize that testimony. This instruction merely advised the jury to consider that testimony along with the other evidence in the case and did not in any way intimate to the jury what the verdict should be.

On page 6 of petitioner's brief counsel say: "A similar question was before this Court in Sinclair v. United States, 279 U. S. 263." The question before the Court in the Sinclair case was in no way similar to the question here presented. The statute under which Mr. Sinclair was prosecuted defined the offense as refusal "to answer any question pertinent to the question under inquiry." Willfulness was not made an element of the offense. Mere refusal to answer pertinent questions constituted the entire offense. In the opinion this Honorable Court said: "The gist of the offense is refusal to answer pertinent

questions." In the case here presented the gist of the offense is WILLFUL failure to supply information. What this Court said in the Sinclair opinion cannot, by any stretch of the imagination, be made to apply to the law and the facts involved in this case.

The same may be said of Chapman v. United States, 8 App. D. C. 302, also relied upon by petitioner and quoted from on page 7 of petitioner's brief. In that case the element of willfulness was not involved.

Counsel for petitioner say, on page 8 of their brief, that the District Court summed up the law of this case, and properly and fully charged the jury, by the following part of the charge:

> "Gentlemen of the jury: There is only one question for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse, and if you should so find from the evidence, he is guilty."

This instruction did not define willfulness. It left the jury to grope for a definition without any assistance from the Court.

It was because of the total failure of the charge in any way to define the word "willful" or to elucidate to the jury the importance or pertinency of this word in the statute, that respondent requested an instruction that would throw light upon the significance of that word.

The requested instruction faithfully followed the law as laid down by this Honorable Court in the cases of Potter v. U. S. and Felton v. U. S., supra. It should have been given.

We agree completely with the statements of counsel for petitioner wherein they say that a person may not "rely upon the advice of counsel in defiance of a court order," and that "if a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent," and that, "if a party may make himself the judge of whether he shall obey the mandate of a statute and by his own act of disobedience defeat the purpose of the statute, then must an important power of Congress be set at naught and every citizen made a law unto himself." These statements are true in their entirety as abstract propositions, but they do not fit the facts appearing in or the questions presented by this case. The Fifth Amendment is still a vital part of the Constitution; one of the pillars of human liberty. That amendment still protects the citizen from self-incrimination. If a citizen is ignorant of the construction placed or to be placed upon that amendment by this Honorable Court; if he honestly and in good faith claims the protection guaranteed by the amendment in the honest, but ignorant and mistaken, belief that it is broad enough to protect him from incriminating himself under a state law, the fact that he did honestly and in good faith attempt to claim that consti-

tutional protection from answering certain questions should and must be considered in arriving at a proper decision of whether his conduct in so refusing was willful.

Counsel for petitioner contend that the Government was required to show only that respondent refused to answer questions; that the mere showing of this fact instantly established, beyond a reasonable doubt, that respondent's conduct constituted a deliberate, intentional and willful violation of the statute; that proof of his refusal to answer necessarily implies willfulness in the legal sense. On page 8 of petitioner's brief appears this statement:

> "The statutes here under consideration do not make bad faith an element of the crime and the Circuit Court of Appeals was without power to add to the statute."

The effect of adopting the construction of the statute suggested by petitioner would be to emasculate the law and destroy its plain meaning. The effect of this interpretation would be to strike the word "willful" from the act and to hold that Congress did not intend to include the word in the statute, or to make its meaning a vital part of the statute.

The fallacy of this contention is pointed out by this question: Would an indictment under this statute be good if it merely charged "failure to supply information," and omitted to charge "willful failure"? It is elementary that a charge that is so material that it must be pleaded must also be proved. It follows logically that the jury should

be instructed upon any fact that is so important that it must be both pleaded and proved.

On page 8 of their brief, counsel for petitioner also make this statement:

> "Where a statute makes a willful act, or the willful refusal to do an act, a crime, it is only necessary to show that the defendant ran counter to the statutory mandate and that in doing so he acted deliberately and willfully."

This is an admission that it was necessary for the prosecution to show that respondent acted willfully. If this was a necessary and vital fact to be shown, it was a fact upon which the jury should have been instructed. The refusal of the trial court to instruct the jury upon this element of the case deprived respondent of a fair trial and constituted reversible error.

Respectfully submitted,

EDMUND BURKE,
Springfield, Illinois,
HAROLD J. BANDY,
Granite City, Illinois,
Attorneys for Respondent.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 88.—October Term, 1933.

The United States of America, Petitioner, *vs.* Harry Murdock.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 11, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

This case is here for the second time.

The respondent was indicted for refusal to give testimony and supply information as to deductions claimed in his 1927 and 1928 income tax returns for moneys paid to others. By a special plea he averred that he ought not to be prosecuted under the indictment because if he had answered the questions put to him he would have given information tending to incriminate him, in contravention of the Fifth Amendment. The United States demurred on the grounds that the plea failed to show that the information demanded would have incriminated or subjected the defendant to prosecution under federal law and that the defendant waived his privilege under the Fifth Amendment. The demurrer was overruled. Upon appeal this court reversed the judgment for the reason that at the hearing before the federal revenue agent the defendant had not invoked the protection of the Fifth Amendment against possible prosecution under federal legislation but solely under state laws. The cause was remanded to the District Court for further proceedings. *United States* v. *Murdock*, 284 U. S. 141.

The petitioner pleaded not guilty, was put upon trial and convicted. He appealed to the Circuit Court of Appeals, which reversed the judgment,[1] and the case was brought here by writ of certiorari.[2] The question presented is whether the trial court

[1] 62 F. (2d) 926.

[2] 290 U. S. —.

correctly instructed the jury as to what constitutes a violation of the sections of the Revenue Acts of 1926 and 1928 upon which the indictment was based.

Section 256 of the Revenue Act of 1926, and section 148 of the Revenue Act of 1928, in identical words, require all persons making payment to another to make a true and accurate return to the Commissioner of Internal Revenue, under such regulations as he shall prescribe, setting forth the amount paid and the name and address of the recipient.[3] Section 1104 of the Act of 1926 and section 618 of the Act of 1928 authorize the Commissioner, for the purpose of ascertaining the correctness of any return, or of making a return where none has been made, through officers or employees of the Bureau of Internal Revenue, to examine books, papers, records and memoranda bearing upon the matters required to be included in the return, and to compel the attendance of the taxpayer or any one having knowledge of the premises, and to take testimony with reference to the matter directed by law to be included in the return, with power to administer oaths to the persons to be interrogated.[4]

Section 1114 (a) of the Revenue Act of 1926 declares:[5]

"Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

Section 146 (a) of the Revenue Act of 1928 is identical with the quoted section of the 1926 Act.[6] The indictment in two counts charged violation of the provisions of the two sections last mentioned.

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[3] U. S. C. Tit. 26, §§ 1023, 2148.

[4] U. S. C. Tit. 26, § 1247, U. S. C. A. Tit. 26, § 1247, note.

[5] 44 Stat. 116; U. S. C. Tit. 26, § 1265.

[6] Except that it substitutes the word "title" for the word "act", 45 Stat. 835; U. S. C. Tit. 26, § 1265.

Upon the trial the Government proved the respondent had been duly summoned to appear before a revenue agent for examination; questions had been put to him; he refused to answer, stating he feared self incrimination; and upon further inquiry disclosed that his fear was based upon possible prosecutions under state statutes. The Government also offered evidence that on a prior occasion at a meeting with certain revenue agents the respondent had refused to disclose the name of the payee of the sums deducted by him in his returns for 1927 and 1928. To this counsel for the respondent objected, on the ground that it was irrelevant to the issue, which was the respondent's refusal to answer when summoned, sworn and interrogated. The prosecuting attorney replied that the willfullness of the respondent's refusal to answer was in issue, and that the proposed evidence bore upon that matter. The court overruled the objection and admitted the testimony. The respondent offered no evidence. In the course of his charge the trial judge said:

"So far as the facts are concerned in this case, Gentlemen of the Jury, I want to instruct you that whatever the Court may say as to the facts, is only the Court's view. You are at liberty to entirely disregard it. The Court feels from the evidence in this case, that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt."

The respondent's request for an instruction in the following words was refused:

"If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."

In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury, *Patton* v. *United States*, 281 U. S. 276, 288; *Quercia* v. *United States*, 289 U. S. 466. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. Such an expression of opinion was held not to warrant a reversal where upon the undisputed and ad-

mitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute. *Horning* v. *District of Columbia,* 254 U. S. 135. The present, however, is not such a case, unless the word "willfully", used in the sections upon which the indictment was founded, means no more than voluntarily.

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton* v. *United States,* 96 U. S. 699; *Potter* v. *United States,* 155 U. S. 438; *Spurr* v. *United States,* 174 U. S. 728); without justifiable excuse (*Felton* v. *United States, supra; Williams* v. *People,* 26 Colo. 272; *People* v. *Jewell,* 138 Mich. 620; *St. Louis, Iron Mountain & S. Ry. Co.* v. *Batesville & W. Tel. Co.,* 80 Ark. 499; *Clay* v. *State,* 52 Tex. Cr. R. 555); stubbornly, obstinately, perversely, *Wales* v. *Miner,* 89 Ind. 118, 127; *Lynch* v. *Commonwealth,* 131 Va. 762; *Claus* v. *Chicago Gt. W. Ry. Co.,* 136 Iowa 7; *State* v. *Harwell,* 129 N. C. 550. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby* v. *Newton,* 121 Ga. 679), or conduct marked by careless disregard whether or not one has the right so to act, *United States* v. *Philadelphia & R. Ry. Co.,* 223 Fed. 207, 210; *State* v. *Savre,* 129 Iowa, 122; *State* v. *Morgan,* 136 N. C. 628.

This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a willful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. In *Felton* v. *United States, supra,* the court considered a statute which required distillers to maintain certain apparatus to prevent the abstraction of spirits during the process of distillation, and declared that if any distiller should "knowingly and wilfully" omit, neglect, or refuse to do anything required by law in conducting his business he should be liable to a penalty. It appeared that in defendant's plant defective appliances caused an overflow and wastage of low wines, and to save these it became necessary, in disregard of the method prescribed by the Act, to catch the spirits and pour them into vats. This was done despite instructions to the contrary by the government officers who were consulted as to what procedure should be followed. It was admitted that the action was innocent in purpose, saved loss of the product to the owner and taxes to the United

States. In an action for the statutory penalty the conduct of the distiller was held not to be willful within the meaning of the law.

Aid in arriving at the meaning of the word "willfully" may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562), and, we think in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who "*willfully*" fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, who by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.

It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until this court pronounced judgment in *United States* v. *Murdock*, 284 U. S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. The question was involved but not decided in *Ballman* v. *Fagin*, 200 U. S. 186, 195, and specifically reserved in *Vajtauer* v. *Commr. of Immigration*, 273 U. S. 103, 113. The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld the respondent's right to have the question of absence of evil motive submitted to the jury, and we are of opinion that the requested instruction was apt for the purpose.

The Government relies on *Sinclair* v. *United States*, 279 U. S. 263. That case, however, construed an altogether different statutory provision. Sinclair was indicted for refusal to answer a

question pertinent to a matter under investigation by a committee of the Senate. The Act upon which the indictment was based declared "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, *willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry,* shall be deemed guilty of a misdemeanor" . . .[7] Two distinct offenses are described in the disjunctive, and in only one of them is willfullness an element. Sinclair having been summoned attended the hearing. He was therefore guilty of no willful default in obeying a summons. He refused to answer certain questions not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty. Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

The judgment is affirmed.

Mr. Justice STONE and Mr. Justice CARDOZO are of opinion that the judgment should be reversed.

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[7] U. S. C. Tit. 2, § 192.